Supreme Court, U.S.
FILED

98 155 JUL 23 1998

OFFICE OF THE CLERK

No. _____

In the
# Supreme Court of the United States
October Term, 1998

Lori A. Todd,
*Petitioner,*

vs.

Ortho Biotech, Inc.,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

James P. McCarthy
*Counsel of Record*
David A. Allgeyer
Ansis V. Viksnins
Scott E. Korzenowski
LINDQUIST & VENNUM P.L.L.P.
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2205
(612) 371-3238

*Counsel for Petitioner*

1998 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

## QUESTION PRESENTED

Whether, in light of this Court's recent decisions in *Faragher v. City of Boca Raton*, 1998 WL 336322 (U.S. June 26, 1998) and *Burlington Industries, Inc. v. Ellerth*, 1998 WL 336326 (U.S. June 26, 1998), the Eighth Circuit used a now discredited negligence standard to hold that an employer can escape liability under Title VII of the Civil Rights Act of 1964 for the admitted sexual harassment of an entry-level sales person by a national-level supervisor simply because the employer took remedial action upon learning of the harassment?

## RULE 29.6 LISTING

Johnson & Johnson is the parent company of Respondent Ortho Biotech, Inc., but never has been made a party to this litigation.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

RULE 29.6 LISTING ..... ii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTORY PROVISION INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

1. Procedural history and jurisdiction ..... 2
2. Facts ..... 3
   a. The parties and principals ..... 3
   b. The assault and immediate aftermath ..... 5
   c. Ortho's response to Moreland's assault ..... 7

REASONS FOR GRANTING THE WRIT ..... 8

I. GIVEN THIS COURT'S CLARIFICATION OF THE LAW REGARDING EMPLOYER LIABILITY FOR SUPERVISORS' ACTS OF SEXUAL HARASSMENT, IT WOULD BE ABJECTLY UNFAIR TO HOLD TODD TO THE APPLICATION OF A NOW ERRONEOUS LEGAL STANDARD ..... 9

II. THE NEGLIGENCE STANDARD EMPLOYED BY THE EIGHTH CIRCUIT IN THE CASE AT BAR IS ERRONEOUS IN LIGHT OF THIS COURT'S DECISIONS IN *FARAGHER* AND *BURLINGTON INDUSTRIES* ..... 10

III. MORELAND'S POSITION AND DUTIES WITHIN ORTHO'S HIERARCHY QUALIFY HIM AS A SUPERVISOR FOR THE PURPOSE OF APPLYING THE RULE FOR EMPLOYER LIABILITY ASSERTED IN *FARAGHER* AND *BURLINGTON INDUSTRIES* ..... 14

IV. THE ESTABLISHED FACTS PRECLUDE ORTHO, AS A MATTER OF LAW, FROM SUCCESSFULLY ASSERTING THE AFFIRMATIVE DEFENSE PROVIDED IN *FARAGHER* AND *BURLINGTON INDUSTRIES* ..... 17

A. Ortho failed to use reasonable care to prevent sexual harassment ..... 18

B. Todd did not fail to take advantage of opportunities by Ortho or to prevent the harm ..... 20

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Burlington Industries, Inc. v. Ellerth*, 1998 WL 336326 (U.S. June 26, 1998) ..... passim

*Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997) ..... 12, 13

*Desist v. United States*, 394 U.S. 244 (1969) ..... 9

*Eddy Potash, Inc. v. Harrison*, 1998 WL 336977 (U.S. June 26, 1998) ..... 10

*Faragher v. City of Boca Raton*, 1998 WL 336322 (U.S. June 26, 1998) ..... passim

*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) ..... 10

*Reynolds v. CSX Transportation, Inc.*, 1998 WL 336984 (U.S. June 26, 1998) ..... 10

*Todd v. Ortho Biotech, Inc.*, 138 F.3d 733 ..... 9

*United States v. Johnson*, 457 U.S. 537 (1982) ..... 9

### FEDERAL STATUTES AND RULES

28 U.S.C. § 1254 (1) (1994) ..... 1

28 U.S.C. § 1331 (1994) ..... 2

28 U.S.C. § 1367 (a) (1994) ..... 2

28 U.S.C. § 2106 (1994) ..... 8

42 U.S.C. § 2000e (a) (1994) ..... 2

42 U.S.C.§ 2000e-2 (a)(1) (1994) ..... 2

Sup. Ct. R. 16 (1) ..... 8

**STATE STATUTES**

Minnesota Human Rights Act, Minn. Stat. ch. 363 (1996) .... 2

**MISCELLANEOUS**

*Analysis: Supreme Court Increases Liability of Employers for Sexual Harassment but Creates Affirmative Defense*, 158 Lab. Rel. Rep. (BNA) 296 (July 6, 1998) ..... 9

Arthur D. Hellman, *"Granted, Vacated, and Remanded" - Shedding Light on a Dark Corner of Supreme Court Practice*, 67 Judicature 389 (1984) ..... 10

Lori A. Todd respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Because the Eighth Circuit's opinion is contrary to this Court's subsequent decisions in *Faragher* and *Burlington Industries*, this Court should (a) summarily reverse the Eighth Circuit's holding that the Respondent-Employer in this matter could escape federal sexual harassment liability by taking after-the-fact actions to address the hostile work environment created by its upper-level supervisor, or, alternatively, (b) reverse and remand the case to the Eighth Circuit for reconsideration in light of *Faragher* and *Burlington Industries*.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1) is reported at 138 F.3d 733. The memorandum and order following the district court's denial of Respondent-Employer's motion for judgment as a matter of law (Pet. App. A-22) is not reported, and the district court's findings of fact, conclusions of law, and order for amended judgment (Pet. App. A-34) is reported at 949 F. Supp. 724.

## JURISDICTION

The United States Court of Appeals for the Eighth Circuit filed its opinion on March 5, 1998. The court of appeals denied a timely petition for rehearing and for rehearing en banc on April 24, 1998 (Pet. App. A-56), and entered its mandate on May 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act makes it unlawful for an employer "and any agent of such a person," 42 U.S.C. § 2000e (a) (1994), "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C.§ 2000e-2 (a)(1) (1994).

## STATEMENT OF THE CASE

### 1. Procedural history and jurisdiction

Petitioner-Employee Lori A. Todd ("Todd"), a former entry-level sales person with Respondent-Employer Ortho Biotech, Inc. ("Ortho"), sued Ortho in the United States District Court for the District of Minnesota for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and the Minnesota Human Rights Act, Minn. Stat. ch. 363. The court had federal question jurisdiction over the Title VII claim under 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claim under 28 U.S.C. § 1367 (a). Following a trial from June 12-23, 1995, the jury found Ortho liable for hostile work environment sexual harassment under Title VII and the district court entered judgment in the amount of $218,000.[1] The district court then denied Ortho's motion to dismiss the Title VII judgment as a matter of law. The district court[2] also found Ortho liable for hostile work environment sexual harassment under Minnesota law and

---

[1] The court also awarded Todd a total of $217,440.26 in attorney fees and costs.

[2] The Minnesota Human Rights Act claim was tried to the court by agreement of the parties.

entered judgment on the state law claim in the amount of $474,000, plus a civil penalty of $50,000.

The United States Court of Appeals for the Eighth Circuit reversed. Ruling that both Title VII and the Minnesota Human Rights Act provide complete defenses to employers that seek to remedy the hostile work environment created by their supervisors, the court of appeals relied upon the jury's finding that Ortho acted promptly following its discovery of the assault and attempted rape of Todd and exonerated Ortho from any Title VII or state law liability. Todd seeks review only of the court of appeals' reversal of her Title VII claim.

## 2. Facts

This action stems from the admitted assault and attempted rape of Todd by Ortho's National Director of Trade Relations, James Moreland ("Moreland"), in his Boston hotel room at the company's 1992 national sales meeting.

### a. The parties and principals

A subsidiary of Johnson & Johnson (T. 9),[3] Ortho is a relatively young pharmaceutical company that at the time of the assault employed between 300 and 400 people nationally, a large percentage of whom were sales representatives/ "product specialists" like Todd. T. 1144.

Todd began employment as a product specialist with Ortho on March 30, 1992. T. 167. Todd sold Ortho's products to physicians, drug wholesalers, and pharmacists. T. 168-169. She had been employed by Ortho for only six months when she received notice of Ortho's national sales meeting and learned that her attendance was required. Pet. App. A-39.

---

[3] T. refers to the district court transcript.

Moreland served as Ortho's National Sales Manager from 1988 until August 24, 1992, when Ortho transferred him laterally to the position of National Director of Trade Relations. T. 608; Pet. App. A-84–85. As National Sales Manager, Moreland managed the field sales managers, who managed the regional managers, who managed the division managers, who managed the product specialists such as Todd. T. 785. The only persons above Moreland in Ortho's hierarchical structure were the president and seven vice presidents. T. 1107-1108. Moreland's was the first picture to appear in an informational booklet provided to Todd and other product specialists upon joining the company. T. 160-161; Pet. App. A-71–A-73. Moreland's signature authorized the reimbursement of Todd's moving expenses when joining Ortho, a cash advance on her payment of salary, and her level of compensation. T. 171-72; Pet. App. A-74–A-76. Moreland regularly sent sales bulletins and memos to Todd and others with information on Ortho and its products. T. 174. Ortho trainers introduced Moreland to Todd's training class, and he was one of the corporate executives who spoke at a dinner marking the conclusion of her training. T. 177.

Moreland remained actively involved with Ortho's sales staff following his new title. His name remained at the top of the sales department's directory. Pet. App. A-77–A-78. He retained his salary, corner office, and perquisites following the lateral move, and continued to report directly to the Vice President of Sales and Marketing. Pet. App. A-84–A-85. Todd testified during trial that Moreland was her "boss's boss's boss [who] supervised the whole sales organization." T. 175. Ortho never provided product specialists such as Todd any information upon which they could have believed that Moreland was anything less than an important supervisor.

### b. The assault and immediate aftermath

Ortho does not challenge that Moreland physically assaulted and attempted to rape Todd in his hotel room during the company's national sales meeting in the early-morning hours of Tuesday, September 22, 1992. The incidents leading up to and including the assault also were largely uncontested. Todd met Moreland late in the evening of Monday, September 21, 1992, in a company-provided hospitality suite. T. 210-212. When Moreland and two other Ortho employees invited Todd to join them in visiting an area jazz club, Todd at first was hesitant, but acquiesced after Moreland made a special invitation. T. 212. Although Todd was tired, she testified that she decided to go in part because he was "one of the highest level people at Ortho Biotech." T. 213. The jazz club was closed, and the group instead went to a local bar for approximately one hour. T. 212-213, 220. Moreland described to Todd his new position as Ortho's National Director of Trade Relations, explaining that the new job would be a "little bit different twist from what [I] was doing before," that he would be "interacting more with the wholesaler field organization," and that he would be "working together" with Todd on one of her major accounts. T. 217.

Upon arrival back at the hotel, the other two members of the group went up an escalator. T. 221. Moreland then followed Todd into an elevator. T. 222. After the elevator doors closed, Moreland reached over and tried to kiss Todd. T. 222. She turned away stating, "What are you doing? Why are you doing this?" T. 223. Moreland began to say he was sorry, that he wanted to apologize for his behavior, that he needed to "clear the air" between them, and that he did not want to apologize in public. T. 223-234. When the elevator doors opened at Moreland's floor, he held the doors open and repeatedly insisted that Todd come to his room to hear an apology. T. 223-224. Todd did not want to go to his room

and declined any need for an apology, but eventually agreed because she believed that she needed to listen to Moreland's apology in order to salvage a decent working relationship with Moreland. T. 224.

Once inside the room, Moreland grabbed Todd, threw her on his bed, pinned her down with his arms, and attempted to rape her. She eventually escaped from his room and ran to the elevator with Moreland pursuing her and calling out her name. T. 228. The elevator came immediately and Todd was able to retreat to her room. T. 229.

At the time of the assault and attempted rape, Todd had not received a sexual harassment policy from Ortho, nor had anyone discussed the company's sexual harassment policy with Todd during her training. T. 232, 262. Todd testified that she was afraid to report an assault by a high level Ortho supervisor, stating that she did not know "what would happen." T. 241. Todd communicated these fears to fellow product specialist Ellen Schoenberg during dinner on Tuesday evening. T. 231. Although Schoenberg did not know to whom Todd should report the assault and attempted rape, she suggested that Todd report it to Chuck Ball, Ortho's Director of Training. T. 232.

Todd approached Ball on Wednesday, September 23, 1992, and requested to speak with him in private. Ball said he was too busy arranging a sales skit[4] to speak with Todd in private and agreed to speak with her later in the day. In the meantime, Moreland approached Todd during lunch and asked -- in what Todd considered to be a threatening voice -- how she was doing. T. 235.

---

[4] The skit, which Todd attended later that day, portrayed a female product specialist becoming so sexually excited over a phone conversation regarding sales data that she rubbed her body and appeared to have an orgasm. T. 228. In another scene, the product specialist pinched the manager on the buttocks. T. 240, 664. A videotape of the skit was played at trial.

Later that day Todd reported the assault and attempted rape to Ball. T. 241, 1011. Because Ball was not the appropriate person at Ortho to respond to sexual harassment matters, Todd had to repeat the story to Director of Employee Relations Craig Mangean. T. 242. Todd displayed her bruises and the finger marks left by Moreland's assault. T. 1013. After returning to her room later that evening, Todd answered a phone call and heard Moreland ask her what she was doing "in a very threatening voice." T. 245. She hung up and immediately reported this further incident. T. 245.

Todd found that she could no longer function at the conference, and on Thursday, September 24, 1992, returned home before the conference's conclusion. T. 247-248. Upon her return, Todd immediately sought help from various doctors (including a trip to a hospital's emergency room), psychiatrists, and counselors. T. 253. Todd was prescribed an anti-depressant, anti-anxiety medication, and another medication for headaches and tension, all of which she took for approximately one year. Todd began seeing a psychotherapist within days of the assault and continued to see the psychotherapist at least once a week from September 1992 through June 1994. T. 267-268. All of the expert witnesses who testified at trial, including Ortho's expert psychiatrist, agreed Todd suffered from post-traumatic stress disorder. T. 544, 677, 1220.

### c. Ortho's response to Moreland's assault

On September 30, 1992, Ortho took Todd's statement about the attack. T. 256. She asked the Director of Employee Relations to send her a copy of Ortho's sexual harassment policy, but he never did. T. 263-264. She asked him to give her updates regarding the investigation of Moreland's assault, but he never did. T. 389, 554-557. Eventually Ortho concluded that Todd's allegations regarding the attack were

true and terminated Moreland for what it termed "serious misconduct." T. 626, 975.

Ortho offered and Todd accepted approximately three to four weeks of paid leave immediately following the assault. T. 397-398. She returned to work in late October 1992. Ortho offered and Todd accepted an invitation to move her therapy sessions to work hours. T. 398-399. Following those accommodations, however, Ortho began to refuse many of Todd's requests for help. Ortho, for example, refused to provide somebody to accompany Todd to a January 1993 regional sales meeting. T. 286. Ortho refused Todd's request in early 1993 to transfer to Houston, where her sister and brother-in-law expected to be living. T. 296-297. After Todd had utilized her vacation and personal time to take a five-week paid leave of absence in late 1993, Ortho refused Todd's request for a six-month unpaid leave of absence from January 12 through July 11, 1994. T. 321. When Todd told Ortho she was not prepared to return to work on a date that Ortho had imposed, Ortho terminated her employment. T. 325.

## REASONS FOR GRANTING THE WRIT

Because the Court of Appeals for the Eighth Circuit utilized a now discredited negligence standard for employer liability and ruled that Ortho's remedial action following its discovery of Moreland's attack upon Todd was dispositive of Title VII liability, this Court should grant this petition for writ of certiorari and, pursuant to 28 U.S.C. § 2106 and Sup. Ct. R. 16 (1), summarily reverse the court of appeals and reinstate the district court judgment on the Title VII claim. In the alternative, Todd requests that this Court grant the petition for writ of certiorari and remand this case to the Eighth Circuit for reconsideration of Ortho's liability for Moreland's actions in light of this Court's decisions in *Faragher v. City of Boca Raton*, 1998 WL 336322 (U.S. June 26, 1998) and *Burlington*

*Industries, Inc. v. Ellerth*, 1998 WL 336326 (U.S. June 26, 1998).

## I. GIVEN THIS COURT'S CLARIFICATION OF THE LAW REGARDING EMPLOYER LIABILITY FOR SUPERVISORS' ACTS OF SEXUAL HARASSMENT, IT WOULD BE ABJECTLY UNFAIR TO HOLD TODD TO THE APPLICATION OF A NOW ERRONEOUS LEGAL STANDARD

The importance of granting this petition rests upon the unfairness of holding Todd to a rule of law that -- subsequent to the court of appeals' decision and prior to this request for Supreme Court review -- was found by this Court to be erroneous. This Court's stated holdings in *Faragher* and *Burlington Industries* have overruled the basis upon which the Eighth Circuit decided Todd's case. *See discussion infra*; *see also Analysis: Supreme Court Increases Liability of Employers for Sexual Harassment but Creates Affirmative Defense*, 158 Lab. Rel. Rep. (BNA) 296, 301 (July 6, 1998) (analyzing the holdings in *Faragher* and *Burlington Industries* and stating that "it appears that the employer [in *Todd v. Ortho Biotech, Inc.*, 138 F.3d 733] would now be held liable and have to pay damages"). As this Court has stated, application of recently decided law to cases pending on appeal "comports with our judicial responsibilities 'to do justice to each litigant on the merits of his own case.'" *United States v. Johnson*, 457 U.S. 537, 555 (1982) (quoting *Desist v. United States*, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting)). Such an application of recently decided law also furthers the goal of treating similarly situated parties similarly. *Id.*

This Court has not hesitated to remand cases where intervening precedent has clarified the law. Indeed, on the

same day as deciding *Faragher* and *Burlington Industries*, this Court granted petitions in two other cases involving questions of employer liability for sexual harassment. *See Eddy Potash, Inc. v. Harrison*, 1998 WL 336977 (U.S. June 26, 1998); *Reynolds v. CSX Transportation, Inc.*, 1998 WL 336984 (U.S. June 26, 1998); *see generally* Arthur D. Hellman, *"Granted, Vacated, and Remanded" - Shedding Light on a Dark Corner of Supreme Court Practice*, 67 Judicature 389, 391 nn. 12-13 (1984).

## II. THE NEGLIGENCE STANDARD EMPLOYED BY THE EIGHTH CIRCUIT IN THE CASE AT BAR IS ERRONEOUS IN LIGHT OF THIS COURT'S DECISIONS IN *FARAGHER* AND *BURLINGTON INDUSTRIES*

It was conceded at trial and on appeal that Moreland created a hostile work environment as defined by Title VII and *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), when he assaulted and attempted to rape Todd. Pet. App. A-10, A-45. In addition, the jury necessarily found that Moreland was a "supervisor" by determining that he used his position of authority to facilitate the harassment. Pet. App. A-61, A-68. Among the facts supporting this determination were the following:

- Moreland worked as Ortho's National Sales Manager until August 24, 1992, less than one month prior to the attack. Pet. App. A-23, A-31, A-40.

- As National Sales Manager, Moreland had been in charge of Ortho's entire sales staff, which included product specialists such as Todd. Pet. App. A-23. Moreland approved Todd's hiring in March 1992 (Pet. App. A-23), her relocation to Rochester, Minnesota (including her

moving expenses), her rate of compensation, and her request for a salary advance. Pet. App. A-74–A-76.

- Moreland appeared prominently in Ortho's promotional brochure that was provided to actual and prospective product specialists. Pet. App. A-71–A-73.

- When Ortho transferred Moreland to the position of National Director of Trade Relations, he maintained the same rank in the company with identical salary and perquisites. Pet. App. A-23. Moreland's new duties included "setting national *sales* policies and interacting with key accounts, drug wholesalers, and product specialists." Pet. App. A-23 (emphasis added).

- Upon his transfer, the company issued a new telephone directory that placed Moreland at the top of the sales division of which Todd was a member. Pet. App. A-77–A-78. Ortho never announced that Moreland would in the future lack authority over product specialists. To the contrary, Ortho announced that Moreland's new duties would include development of "a greater customer orientation resulting in marketshare and *sales forecast achievement*." Pet. App. A-84–A-85 (emphasis added).

- Todd offered uncontroverted testimony that, on the night preceding the attack, Moreland told her he would continue to work actively with product specialists in his new role. Pet. App. A-30. Todd testified that she believed Moreland would continue to exercise direct and indirect supervisory functions over her and that she considered Moreland to be her "boss's boss's boss, and supervised the whole sales organization." T. 175.

In addition, the jury utilized a standard based upon the same common law agency principle embraced in *Faragher* and *Burlington Industries*, and found that Moreland used his actual or apparent authority at Ortho to further his harassment of Todd, or that he was otherwise aided in accomplishing his harassment by virtue of his position at Ortho. Pet. App. A-30–A-31, A-61. Among the facts upon which the jury relied in reaching this conclusion were the following:

- The theme of the national sales meeting was "Connections;" Ortho employees and supervisors were encouraged to "get to know one another." Pet. App. A-40.

- Todd met Moreland at an Ortho-sponsored hospitality suite where, at his suggestion, she agreed to accompany two other product specialists and Moreland to a local jazz club. Pet. App. A-39–A-40.

- After rebuffing Moreland's attempt to kiss her in the hotel elevator, Todd chose to comply with Moreland's insistence that she hear his apology because she was "hoping not to upset an upper level manager." Pet. App. A-40–A-41. As a new Ortho employee attending her first national meeting, Todd would not have entered Moreland's room but for his position of superiority in the company.

In spite of this evidence, the Eighth Circuit disregarded the agency theory of employer liability relied upon by the district court -- and recently adopted as the basis for this Court's decisions in *Faragher* and *Burlington Industries*. Rather, the Eighth Circuit based its decision on the now discredited negligence standard of employer liability that it had adopted in *Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997). The court of appeals expressly relied

upon this erroneous rule of law in reversing the Title VII judgment against Ortho:

> Since the district court's decision, we have clarified that the court erred in not applying our normal hostile environment standard. *Even when the hostile environment was created by a supervisor's sexual harassment, the employer is not liable unless it "knew or should have known of the harassment yet failed to take proper remedial action.*"

Pet. App. A-11 (quoting *Davis,* 115 F.3d at 1368) (emphasis added). In *Davis,* the Eighth Circuit had for the first time explicitly ruled that a negligence standard for employer liability applies in all hostile environment sexual harassment cases regardless of the identity of the harasser. 115 F.3d at 1368. Noting the jury had found that Ortho took prompt remedial action upon learning of Moreland's assault and attempted rape, the court of appeals cited *Davis* and found that Ortho's post-attack actions completely shielded it from Title VII liability. Pet. App. A-13.

Although this Court in *Faragher* and *Burlington Industries* did not accept in toto the pure vicarious liability formula employed by a number of the circuits with respect to employer liability for supervisors' acts of sexual harassment, it is equally apparent that this Court rejected outright the negligence formula employed by the Eighth Circuit to reverse the jury verdict in the case at bar. As this Court stated: "It makes sense to hold an employer vicariously liable under Title VII for some tortious conduct of a supervisor made possible by use of supervisory authority." *Faragher*, 1998 WL 336322, at *17. Thus, Ortho is vicariously liable under Title VII for its high-ranking supervisor's assault and attempted rape of a subordinate employee at a company event where attendance was required. As this Court stated in

explaining why it was applying a standard different than that applied in co-worker harassment cases:

> When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor whose 'power to supervise – [which may be] to hire and fire, and to set work schedules and pay rates – does not disappear ... when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion.'

*Id.* (citation omitted) (parenthetical in original). Todd did not dare walk away from Moreland's promised apology, or tell him where to go after the kiss in the elevator, because of his position. The jury found that Moreland used his superior position over Todd to perpetrate the harassment. The Eighth Circuit's reversal of the jury verdict based on an incorrect negligence standard was erroneous as a matter of law and counsels for the granting of Todd's petition.

## III. MORELAND'S POSITION AND DUTIES WITHIN ORTHO'S HIERARCHY QUALIFY HIM AS A SUPERVISOR FOR THE PURPOSE OF APPLYING THE RULE FOR EMPLOYER LIABILITY ASSERTED IN *FARAGHER* AND *BURLINGTON INDUSTRIES*.

Ortho argued in both the district court and court of appeals that it could not be liable for Moreland's sexual harassment under an agency theory because, at the time of the attack, Moreland did not directly supervise Todd or other product specialists. Todd anticipates that Ortho will oppose her petition by arguing that the *Faragher* and *Burlington*

*Industries* holdings, which address a hostile work environment "created by a supervisor with immediate (or successively higher) authority over the employee," do not apply to the facts of this case. *Faragher*, 1998 WL 336322, at *19; *Burlington Industries*, 1998 WL 336326, at *15. Ortho may assert that Moreland was not in Todd's reporting chain and thus not her supervisor.

Such an argument by Ortho would be wrong. The established facts place this case squarely within the purview of the *Faragher* and *Burlington Industries* rule of employer liability for hostile work environment sexual harassment perpetrated by a supervisor.

The basis of the Court's rulings in both *Faragher* and *Burlington Industries* was a finding that the harasser utilized his "power to supervise" to create the hostile work environment. In both *Faragher* and *Burlington Industries*, this Court concluded that the harassers actually possessed this "power to supervise." Because the harassers in both cases were relatively low-level managers (a mid-level manager in *Burlington Industries*, and second- and fourth-level managers in an eight-level hierarchical structure in *Faragher*), this Court had to look to the harasser's specific abilities to control the day-to-day activities of the victim to make such a finding. In the case at bar, the Court need look no deeper than Moreland's standing among Ortho's corporate executives to locate his "power to supervise."

It was established below that, prior to his transfer, Moreland was the third highest ranking executive in Ortho's large sales department; that Ortho never classified his change in title as anything less than a lateral move; that Ortho continued to list Moreland as part of the sales department hierarchy after the transfer; that Moreland told Todd he would continue to work with product specialists such as herself; and that Moreland remained in close professional and personal contact with those who Ortho concedes had direct authority

over Todd. T. 956, 978, 1110, 1114, 1146, 1147. As the district court stated, transfer or not, Moreland remained an upper level supervisor whose "power to supervise" facilitated his ability to harass Todd. Pet. App. A-30–A-31.

In *Burlington Industries,* the employer was liable for the supervisor's harassment in part because the victim, "while on a business trip ... felt compelled to accept [an invitation to a hotel lounge] because [the supervisor] was her boss." 1998 WL 336326, at *5. In the case at bar, the district court found that Todd accepted Moreland's invitation to accompany him to both the jazz club and his hotel room in large part because she considered him to be her "boss's boss's boss." T. 175; Pet. App. A-31.

Even if Ortho is able to establish that Moreland no longer retained the specific authority to hire or fire product specialists such as Todd,[5] his position among Ortho's elite provided the "power to supervise" upon which this Court based its holdings in *Faragher* and *Burlington Industries.* The power to supervise may or may not include the power "to hire and fire, and to set work schedules and pay rates." *Faragher,* 1998 WL 336322, at *17. Moreland's reliance upon his status and position in the company in accomplishing the harassment places this case within the rule established in *Faragher* and *Burlington Industries.*

Moreover, should this Court, or a lower court, conclude that Moreland retained no actual authority over Todd and other product specialists, the case at bar would nevertheless fall within those portions of *Faragher* and *Burlington Industries* relating to apparent authority. In adopting the agency principles in the Restatement (Second) of Agency, this Court stated:

---

[5] And Todd reiterates that Ortho has not established that fact at any level of this proceeding.

> Subsection 219(2)(d) concerns vicarious liability for intentional torts committed by an employee when the employee uses apparent authority (the apparent authority standard), or when the employee "was aided in accomplishing the tort by the existence of the agency relation" (the aided in the agency relation standard).

*Burlington Industries*, 1998 WL 336326, at *12. In deciding whether to apply vicarious liability in the "unusual case, [where] it is alleged there is a false impression that the actor was a supervisor, when he in fact was not," the key determination is not whether the supervisor was actually in the victim's "chain of command," but whether the victim's perception that the supervisor had actual authority was reasonable. *Id.* As the facts of this case unequivocally establish, Todd's perception that Moreland possessed authority over her career was reasonable as a matter of law.

## IV. THE ESTABLISHED FACTS PRECLUDE ORTHO, AS A MATTER OF LAW, FROM SUCCESSFULLY ASSERTING THE AFFIRMATIVE DEFENSE PROVIDED IN *FARAGHER* AND *BURLINGTON INDUSTRIES*.

Ortho is vicariously liable for Moreland's sexual harassment of Todd unless it can show that it:

> (a) ... exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

*Faragher*, 1998 WL 336322, at *19; *Burlington Industries*, 1998 WL 336326, at *15. Thus, an employer can escape liability for the sexual harassment of its supervisor only if it can establish all of the following: (1) that it exercised reasonable care to prevent sexually harassing behavior in the first place, (2) that it promptly remedied any acts of sexual harassment,[6] and (3) that the employee unreasonably failed to do her part, either by not taking advantage of preventive or corrective opportunities provided by the employer, or by failing to avoid harm. *Id.* As a matter of law, Ortho cannot possibly establish all three elements of this affirmative defense. Therefore, this Court should grant Todd's petition for writ of certiorari and summarily reverse the ruling of the Eighth Circuit. *See Faragher*, 1998 WL 336322, at *20 (holding as a matter of law that the employer could not establish the affirmative defense).

### A. Ortho failed to use reasonable care to prevent sexual harassment

Ortho failed to exercise reasonable care to prevent sexual harassment by, among other things, failing to properly distribute a sexual harassment policy. The employer in *Faragher* could not, as a matter of law, show that it used reasonable care in preventing harassment:

> The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors.

---

[6] Because the jury found that Ortho corrected Moreland's sexually harassing behavior, Todd will not address that portion of the affirmative defense in this petition.

1998 WL 336322, at *20. At the time of the assault, Ortho likewise had failed to disseminate its policy against sexual harassment among its employees who did not work at corporate headquarters in New Jersey. In fact, at the time of Moreland's attack, Ortho's practice was not to disseminate its sexual harassment policy to product specialists like Todd and other field employees. Six weeks after Moreland's assault and attempted rape of Todd, Ortho finally distributed its sexual harassment policy to all employees under the following cover memorandum:

> In the past, the [Ortho] Policy and Practices Manual was distributed only to employees who were responsible for supervising other employees. *The perception that generated from this practice*, as reported in our ACE program, *was that there was information that was either "hidden" or "privileged."* Our intent was to have a wide enough distribution of the manual to allow all employees access through their supervisors. This created a special difficulty in the field as the Division Managers and Regional Managers often times were geographically separated. It became obvious that, in order to maximize communication of the policies and deal with the negative perceptions, we would need to change the method of distribution of the manual. Therefore, attached to this memo you will find the [Ortho] Personnel Practices Manual for your use. *It is important to note that the practice of placing the manual in the "hands" of all field employees is new to our company.*

Pet. App. A-82–A-83 (emphasis added). Todd's testimony was uncontroverted that she had not received Ortho's sexual

harassment policy at the time of the assault. Todd did not know to whom she should report the assault by Moreland, nor did she know of any policy against retaliation for making such an accusation. T. 170, 177, 176, 241. Accordingly, Ortho is precluded as a matter of law from asserting that it exercised reasonable care to prevent any sexually harassing behavior.

### B. Todd did not fail to take advantage of opportunities by Ortho or to prevent the harm that occurred

Todd not only took advantage of all preventive and corrective opportunities presented by Ortho, she also did all she could to avoid further harm. Among other things, Todd:

- Reported the assault to a co-worker on the same day it occurred.
- Avoided a confrontation with Moreland by running away from him during a chance meeting a day after the assault.
- Reported the assault to Ortho's supervisory personnel.
- Avoided another confrontation with Moreland when he phoned her in her room one day after the assault.
- Immediately reported the phone call to management.
- Met with Director of Employee Relations Craig Mangean a week after the assault to provide details of the incident and later presented a signed statement to Ortho regarding the assault.
- Utilized unpaid leave and her own personal vacation time to assist in her recovery from the assault.

- Participated in regular psychotherapy for nearly two years following the assault.

- Agreed to resume her travel to other regional and national sales meetings when the company provided escorts.

In addition, the jury made a specific finding that Todd did not fail to mitigate her damages. Pet. App. A-63. In fact, it was not until Ortho refused to grant Todd a requested unpaid leave that the employment relationship ended. At no time has Ortho even asserted that Todd failed in any way to take advantage of any preventive or corrective opportunities it provided. Thus, as a matter of law, Ortho is unable to prove the affirmative defense established by *Faragher* and *Burlington Industries*, and the Eighth Circuit's opinion should be reversed.

## CONCLUSION

The petition for writ of certiorari should be granted and the ruling of the United States Court of Appeals for the Eighth Circuit should be summarily reversed. Alternatively, the Court should grant the petition and remand the case to the Eighth Circuit for reconsideration consistent with this Court's holdings in *Faragher* and *Burlington Industries*.

Dated: July 22, 1998 Respectfully submitted,

James P. McCarthy
*Counsel of Record*
David A. Allgeyer
Ansis V. Viksnins
Scott E. Korzenowski
LINDQUIST & VENNUM P.L.L.P.
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2205
(612) 371-3211

*Counsel for Petitioner*

## INDEX TO APPENDIX


1. Opinion of the Court of Appeals for the Eighth Circuit (March 5, 1998) ..... A-1

2. Order for Judgment (June 23, 1995) ..... A-19

3. Judgment in a Civil Case (June 23, 1995) ..... A-21

4. Memorandum and Order Denying Motion for Judgment as a Matter of Law (March 29, 1996) ..... A-22

5. Trial Court Findings of Fact, Conclusions of Law and Order for Judgment (November 22, 1996) ..... A-34

6. Judgment in a Civil Case (November 25, 1996) ..... A-51

7. Order for Judgment (January 2, 1997) ..... A-53

8. Judgment in a Civil Case (January 2, 1997) ..... A-55

9. Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc (April 24, 1999) ..... A-56

10. Special Verdict Form (June 23, 1995) ..... A-57

11. Minn. Stat. § 363.01, 363.03 ..... A-64

12. 42 U.S.C. §§ 2000e, e-2 ..... A-66

13. Jury Instructions ..... A-68

14. Excerpt from Exhibit Depicting Moreland ..... A-71

15. Trial Exhibit P #5 ..... A-74

16. Trial Exhibit P #6 ..... A-75

17. Trial Exhibit P #7 ..... A-76

18. Trial Exhibit P #11 ..... A-77

19. Trial Exhibit P #30 ..... A-79

20. Trial Exhibit D #2 ..... A-84

138 F.3d 733
76 Fair Empl.Prac.Cas. (BNA) 341, 72 Empl. Prac. Dec. P 45,239
**(Cite as: 138 F.3d 733)**
**< KeyCite Yellow Flag>**

**Lori A. TODD, Plaintiff--Appellee,**

**v.**

**ORTHO BIOTECH, INC., Defendant--Appellant.**

**Nos. 97-1126, 97-1220.**

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 20, 1997.

Decided March 5, 1998.

Former employee sued former employer for sexual harassment in violation of Title VII and Minnesota Human Rights Act (MHRA). The United States District Court for the District of Minnesota, Michael J. Davis, J., 949 F.Supp. 724, entered judgment for former employee, and former employer appealed. The Court of Appeals, Loken, Circuit Judge, held that: (1) under both Title VII and Minnesota law, employer may escape liability for its supervisor's acts of sexual harassment if it takes timely and appropriate remedial action; (2) jury's finding that employer took proper remedial action, after learning of supervisor's alleged attempted rape of employee at national sales meeting, defeated Title VII claim; and (3) length of employer's investigation, giving supervisor a valuable severance package, and refusing to grant employee's subsequent requests for transfer, did not nullify finding of

timely and appropriate remedial action by employer for purposes of MHRA claim.

Reversed and remanded.

Richard S. Arnold, Chief Judge, filed concurring opinion.

**[1] CIVIL RIGHTS 167**
78k167
Plaintiff may establish violation of Title VII by proving that discrimination based on sex has created hostile or abusive work environment. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

**[2] CIVIL RIGHTS 167**
78k167
For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

**[3] CIVIL RIGHTS 167**
78k167
To prevail on claim of hostile work environment sexual harassment, plaintiff must prove that she was victim of unwanted harassment based upon her sex that affected term, condition, or privilege of employment, and that employer knew or should have known of harassment and failed to take proper remedial action. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e2(a)(1).

**[4] CIVIL RIGHTS 389**
78k389
In sexual harassment case, district court erred reversibly in instructing jury that, if alleged harasser was supervisor,

employer could not escape liability by taking some after the fact remedial action; error in not applying normal hostile work environment standard deprived the employer of complete defense - that it took timely and appropriate remedial action to correct serious, one-time misconduct occurring outside workplace - merely because offender was "supervisor" who had no direct authority over victim. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e2(a)(1).

**[4] FEDERAL COURTS 909**
170Bk909
In sexual harassment case, district court erred reversibly in instructing jury that, if alleged harasser was supervisor, employer could not escape liability by taking some after the fact remedial action; error in not applying normal hostile work environment standard deprived the employer of complete defense - that it took timely and appropriate remedial action to correct serious, one-time misconduct occurring outside workplace - merely because offender was "supervisor" who had no direct authority over victim. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e2(a)(1).

**[5] CIVIL RIGHTS 167**
78k167
Even when hostile environment was created by supervisor's sexual harassment, employer is not liable unless it knew or should have known of harassment yet failed to take proper remedial action. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e2(a)(1).

**[6] CIVIL RIGHTS 371**
78k371
Supervisor's liability is imputed to employer in cases of "quid pro quo" sexual harassment, where sexual favors, for example, are directly linked to grant or denial of employment

benefit; however, this strict liability standard does not apply in hostile environment sexual harassment claims, even when harasser is supervisor. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e2(a)(1).

**[7] CIVIL RIGHTS 167**
78k167
Plaintiff employee failed to prove essential element of hostile work environment sexual harassment claim under Title VII, stemming from supervisory employee's alleged attempted rape of plaintiff at national sales meeting, given jury's express finding, supported by trial evidence, that employer took proper remedial action after learning of supervisor's alleged harassment. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1).

**[8] CIVIL RIGHTS 167**
78k167
Under Minnesota Human Rights Act (MHRA), employer may escape liability for its supervisor's acts of sexual harassment if it takes timely and appropriate remedial action. M.S.A. §§ 363.01, subds. 14, 41, 363.03, subd. 1(2)(c).

**[9] CIVIL RIGHTS 451**
78k451
District Court's finding that employer's director of trade relations used his authority or position with employer to further his sexual harassment of plaintiff did not support imposition of liability on employer under Minnesota Human Rights Act (MHRA). M.S.A. § 363.01, subd. 41.

**[10] CIVIL RIGHTS 167**
78k167
Employer took timely and appropriate remedial action after learning of supervisor's alleged sexual assault of employee at

national sales meeting, thus absolving employer of liability for sexual harassment under Minnesota Human Rights Act (MHRA), where managers received employee's complaint and offered her assistance within forty-eight hours of incident, employer offered to pay employee's uninsured therapy costs and granted her substantial paid leave, and senior management confronted supervisor when he returned from sales conference, investigated complaint thoroughly, and ultimately fired supervisor. M.S.A. §§ 363.01, subds. 14, 41, 363.03, subd. 1(2)(c).

**[11] JUDGMENT 715(1)**
228k715(1)
Minnesota Human Rights Act (MHRA) claims should be tried to jury in federal court, and jury's finding on issue common to both Title VII and MHRA claims is conclusive. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; M.S.A. § 363.01 et seq.

**[11] JURY 14(1.5)**
230k14(1.5)
Minnesota Human Rights Act (MHRA) claims should be tried to jury in federal court, and jury's finding on issue common to both Title VII and MHRA claims is conclusive. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; M.S.A. § 363.01 et seq.

**[12] CIVIL RIGHTS 167**
78k167
Fact that employer's investigation of employee's sexual harassment complaint took 30 days did not support finding that employer failed to take timely and appropriate remedial action after learning of supervisor's alleged sexual assault of employee at national sales meeting, as required to hold employer liable for sexual harassment under Minnesota

Human Rights Act (MHRA); given supervisor's vigorous denials, employer could not be faulted for carefully investigating two conflicting versions of serious incident that could not be independently corroborated. M.S.A. §§ 363.01, subds. 14, 41, 363.03, subd. 1(2)(c).

**[13] CIVIL RIGHTS 167**
78kl67
Giving supervisor a valuable severance package did not support finding that employer failed to take timely and appropriate remedial action after learning of supervisor's alleged sexual assault of employee at national sales meeting, as required to hold employer liable for sexual harassment under Minnesota Human Rights Act (MHRA); supervisor was high-ranking minority employee with two decades of experience and no complaints on his record, and he vigorously denied employee's allegations and accused employer of race discrimination. M.S.A. §§ 363.01, subds. 14, 41, 363.03, subd. 1(2)(c).

**[14] CIVIL RIGHTS 167**
78kl67
Employer's failure to accommodate employee's later requests for transfer to another state and for lengthy personal leave, and employee's contention that some at company treated her as "non-person," did not nullify employer's timely and appropriate remedial action in response to employee's sexual harassment complaint, and thus employer was not liable for harassment under Minnesota Human Rights Act (MHRA); subsequent events occurred months after alleged incident of harassment and were basis for employee's separate Title VII retaliation claim, which jury rejected. M.S.A. §§ 363.01, subds. 14, 41, 363.03, subd. 1(2)(c).

*735 David F. Herr, Minneapolis, MN, argued, Howard B. Tarkow, Susan E. Oliphant and Cynthia F. Gilbertson, on the brief, for Defendant-Appellant.

David A. Allgeyer, Minneapolis, MN, argued, Ansis V. Viksnins and Theresa H. Tostengard, on the brief, for Plaintiff-Appellee.

Before RICHARD S. ARNOLD, Chief Judge, LOKEN and HANSEN, Circuit Judges.

LOKEN, Circuit Judge.

Ortho Biotech, Inc. ("Ortho"), appeals a judgment in favor of its former employee, Lori Todd, on her claims of sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1988), and the Minnesota Human Rights Act ("MHRA"), Minn.Stat. §§ 363.01 et. seq. (1982). Concluding that Ortho took timely and appropriate action to remedy another employee's attempted rape of Todd at a national sales meeting, and that such action is a complete defense to her claims under Title VII and the MHRA, we reverse.

We summarize the facts as found by the district court. On September 21, 1992, Todd was a sales representative, or product specialist, working for Ortho's Minnesota regional office and attending Ortho's national sales meeting in Boston. After a full day of conferences, Todd stopped at the hospitality suite, where she agreed to go to a jazz club with two other product specialists and James Moreland, Ortho's Director of Trade Relations. The group later went to a local bar, where Moreland drank shots of vodka and exchanged sexually oriented jokes with Todd. Back at the hotel, their companions returned to the hospitality suite, leaving Todd

and Moreland alone in an empty elevator. Moreland grabbed Todd and attempted to kiss her but she pushed him away, asking "What are you doing?" Moreland apologized and suggested Todd accompany him to his room for a complete apology. Todd said that was unnecessary, but complied when Moreland persisted, fearful of upsetting a high-ranking Ortho official. Once inside the room, Moreland overpowered Todd, pinned her to the bed, and attempted to rape her. When Todd began hyperventilating, Moreland allowed her to escape from the room.

The next evening, Todd reported the attack to another product specialist, who urged her to report the incident to Charles Ball, Ortho's Director of Management Development. Todd approached Ball the next morning and asked for a private meeting, without telling him she had been attacked. Ball agreed to meet at the end of that day's conferences. Todd attended the scheduled meetings that day, including a skit she found sexually offensive. She met Ball in her hotel room that evening, told him about the attack and, at his urging, also told Craig Mangean, Director of Employee Relations. Ball was shocked and sympathetic. Mangean told Todd that she had a right to inform the police, but she declined to do so. She said that Mangean could tell the company attorney of the incident but asked that Moreland's superiors not be informed. At Todd's request, Ball and Mangean accompanied her to dinner. After dinner, Todd reported the incident ***736** to her immediate supervisor, Division Manager John Hess. She returned to her room, where she received a brief phone call from Moreland. Todd reported the call to Ball, who offered to move her to another room. She declined, saying she felt safe in her own room. Todd returned to Minnesota the next day, where she later obtained medical attention, including treatment for depression and anxiety.

Officials at Ortho's headquarters in New Jersey contacted Moreland promptly after receiving Todd's complaint and confronted him early the following week with Todd's accusations. Moreland denied assaulting Todd and claimed he was being targeted because he is an African-American. After a three-week investigation, Ortho discharged Moreland but gave him a severance package worth over $100,000 in exchange for his release of all claims against Ortho, including Title VII claims.

Todd commenced this lawsuit in June 1993 and ceased working for Ortho in March 1994. The district court tried her Title VII claim to a jury, which awarded Todd $128,000 for lost earnings and $90,000 for emotional distress. Her MHRA claim was tried to the court, which awarded Todd $524,000--consisting of three times the jury's lost earnings award, $90,000 for mental suffering, and a $50,000 fine to the State of Minnesota--plus $217,440.26 in attorneys' fees and costs. Ortho appeals, contending that it is not liable for sexual harassment under either Title VII or the MHRA because it took prompt and effective action in response to Moreland's misconduct.

## I. The Title VII Claim

[1][2] Title VII prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment" on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). "[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. " Meritor Savings Bank v. Vinson, 477 U.S. 57, 66, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986). "For sexual harassment to be actionable," the Court explained, "it must be sufficiently severe or pervasive to alter the

conditions of the victim's employment and create an abusive working environment." Id. at 67, 106 S.Ct. at 2405 (quotation omitted). In this case, Ortho quite properly concedes that an attempted rape at a national sales meeting is sufficiently severe misconduct to be actionable sexual harassment. The issue, then, is whether Ortho is liable for Moreland's misconduct.

[3][4] In this circuit, to prevail on a claim of hostile work environment sexual harassment, a plaintiff must prove that she was a victim of unwanted harassment based upon her sex that affected a term, condition, or privilege of employment, and that the employer knew or should have known of the harassment and failed to take proper remedial action. See Callanan v. Runyun, 75 F.3d 1293, 1296 (8th Cir.1996). However, the district court did not apply that standard. Relying on authority from other circuits, the court instruc[illegible] the jury that a different standard applies if the harassing c[illegible] worker, here Mr. Moreland, was a "supervisor." Instruction No. 37 stated:

> An employer is liable for the sexual harassment committed by its supervisor if the supervisor used his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of his supervisory powers. In such a case, the employer cannot escape liability by taking some after the fact remedial action. (Emphasis added). On the other hand, Instruction No. 40 advised the jury that, if Moreland was not a supervisor, Ortho would only be liable if Todd proved that Ortho knew or should have known of Moreland's harassment and failed to take prompt and effective remedial action to stop it. The jury's special verdict found that Ortho knew of Moreland's actionable harassment, that Ortho did not fail to take prompt and effective remedial action, but that Ortho is liable

because Moreland used his authority and position with Ortho to further the harassment.

*737 [5] Since the district court's decision, we have clarified that the court erred in not applying our normal hostile work environment standard. Even when the hostile environment was created by a supervisor's sexual harassment, the employer is not liable unless it "knew or should have known of the harassment yet failed to take proper remedial action." Davis v. City of Sioux City, 115 F.3d 1365, 1368 (8th Cir.1997); see Spencer v. Ripley County, 123 F.3d 690, 691 (8th Cir. 1997). In Davis, we reversed and remanded for a new trial because the district court instructed the jury that knowledge of a high-level supervisor's sexual harassment should be imputed to the employer. Knowledge is not the issue in this case. Rather, the error here is more far-reaching, for it deprived the employer of a complete defense--that it took timely and appropriate remedial action to correct serious, one-time misconduct occurring outside the workplace-merely because the offender was a "supervisor" who had no direct authority over the victim. We conclude Instruction No. 37 was reversible error.

[6] As we noted in Davis, 115 F.3d at 1367, a supervisor's liability is imputed to the employer in cases of "quid pro quo" sexual harassment, where sexual favors, for example, are directly linked to the grant or denial of an employment benefit.[1] In urging us to affirm, the EEOC as amicus argues that we should adopt the imputed liability standard used in quid pro quo cases for hostile environment sexual harassment claims when the harasser is a supervisor. Interestingly, this is

[1] This principle is of no help to Todd in this case because the district court denied her tardy attempt to amend her complaint to assert a claim of quid pro quo harassment, and she has not challenged that ruling on appeal.

a different standard than the agency urged the Supreme Court to adopt in Meritor. See 477 U.S. at 70-71, 106 S.Ct. at 2407-08. The Court in Meritor said it is "wrong" to "impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." 477 U.S. at 73, 106 S.Ct. at 2408. The EEOC argues that its proposed rule would not violate this principle because "an employer would not be liable, without notice, where, even though the harasser was a supervisor, he was not in the victim's chain of command or had no authority over her employment." But that contention is inconsistent with the district court's instruction in this case, which only required the jury to find that Moreland was an Ortho supervisor, not that he was Todd's supervisor. The fact is that Moreland was not in Todd's "chain of command" when he assaulted her, which leaves the EEOC's support of Todd's position with little credibility.

Viewing the question more broadly than the facts of this case, we think it contrary to both the intent of the statute and principles of agency law to impose liability upon an employer for the wrongful act of a supervisor acting well beyond the scope of his duty, particularly when the harassment complained of is a one-time act committed outside the workplace that the employer could not have anticipated. A strict liability standard will not encourage employers to promulgate anti-sexual harassment policies. A rigid standard of imputed liability will discourage employers from aggressively investigating complaints of sexual harassment by supervisors, complaints which, if proven true, will only redound to the employer's financial detriment. And such a standard fails to encourage and reward employers for taking prompt and effective remedial action to discipline sexual harassment offenders and to restore for the victim a workplace free of such discrimination. Thus, the strict liability standard

is inconsistent with the statute's ultimate goal, which is to eliminate sex discrimination, not simply to "point a finger at deep pockets upon the incident of harassing behavior." Jennifer L. Johnson, Employment Law--Are Employers Strictly Liable for Supervisor Sexual Harassment in the Fifth Circuit [etc.], 38 S. Tex. L.Rev. 965 (1997).

[7] Ordinarily, we would remand for a new trial of the Title VII claim, as in Davis. However, here the jury expressly found that Ortho took proper remedial action after learning of Moreland's harassment. We have reviewed the record and conclude that finding is well supported by the trial evidence. Because Todd failed to prove this ***738** essential element of a hostile work environment claim, we reverse this portion of the judgment and direct that judgment be entered dismissing her Title VII claim. See Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469-70, 86 L.Ed. 680 (1942).

II. The MHRA Claim

[8][9] Unlike Title VII, the MHRA expressly prohibits sexual harassment in employment. See Minn.Stat. §§ 363.01, subd. 14; 363.03, subd. 1(2)(c). The statute also defines sexual harassment to include:

> conduct or communication [which] has the purpose or effect of substantially interfering with an individual's employment, public accommodations [etc.]; and in the case of employment, [when] the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Minn.Stat. § 363.01, subd. 41 (emphasis added). Thus, when we shift our consideration of the supervisor harassment issue to Todd's MHRA claim, we begin with the proposition that Minnesota law is consistent with our Title VII decision in Davis--"[a]n employer may escape liability for its supervisor's

acts of sexual harassment if it takes timely and appropriate remedial action." Fore v. Health Dimensions, Inc., 509 N.W.2d 557, 561 (Minn.App.1993). To our knowledge, the Minnesota Supreme Court has not addressed this issue, but it has adhered to the plain meaning of this portion of the statute in cases of co-worker harassment. See McNabb v. Cub Foods, 352 N.W.2d 378, 381-82 (Minn.1984). We believe that Court, like the Minnesota Court of Appeals, would allow employers the "timely and appropriate remedial action" defense in cases of supervisor harassment, at least in a case such as this where Moreland was not Todd's direct supervisor and the onetime harassment occurred outside their normal workplace. We reject as contrary to the plain language of Minn.Stat. § 363.01, subd. 41, the district court's conclusion that Ortho is liable under the MHRA because Moreland used his authority or position with Ortho to further his sexual harassment.

[10] We must therefore turn to the district court's alternative MHRA holding, that Ortho is liable because it knew of Moreland's harassment and did not take timely and appropriate remedial action. Without question, Ortho had almost immediate knowledge of Moreland's sexual assault. Todd reported the assault to Ball, Mangean, and Hess within forty-eight hours of the incident, and those managers received and acted on her complaint on behalf of Ortho. Thus, we need not explore an issue that has troubled the Minnesota courts, namely, under what circumstances knowledge of sexual harassment may be imputed to an employer because the harasser was a supervisor. Compare Giuliani v. Stuart Corp., 512 N.W.2d 589, 595 (Minn.App.1994), with Weaver v. Minnesota Valley Labs., Inc., 470 N.W.2d 131, 134-35 (Minn. App. 1991). Imputing knowledge of Moreland's after hours misconduct to Ortho seems unrealistic, but in any event Ball's prompt response to Todd's complaint two evenings later

makes the initial timeliness of Ortho's remedial actions a non-issue.

[11] The real issue of course is whether Ortho took appropriate remedial action when Todd complained of sexual harassment by Moreland, an issue the jury resolved in Ortho's favor. The jury's finding should have resulted in the dismissal of Todd's MHRA claim for two reasons: first, MHRA claims should be tried to the jury in federal court, see Kampa v. White Consolidated Indus., Inc., 115 F.3d 585, 586 (8th Cir.1997); and second, the jury's finding on an issue common to both claims is in any event conclusive, see Bush v. Marshalltown Medical & Surgical Center, 123 F.3d 1130, 1132 n. 2 (8th Cir.1997). However, Ortho did not preserve these issues in the district court.

In determining whether an employer with knowledge of sexual harassment has taken "timely and appropriate remedial action," the Minnesota courts have focused on three specific types of potential remedial measures whether the employer has acted to discourage sexual harassment before it happens, for example, by disseminating a sexual harassment policy or establishing a well-publicized procedure for resolving such complaints; whether the employer has acted to alleviate *739 the victim's plight, for example, by transferring her to another shift or job site; and, perhaps most importantly, whether the employer has adequately investigated the complaint and taken suitable disciplinary action against an offender. See McNabb, 352 N.W.2d at 384; Fore, 509 N.W.2d at 561; Schlitz v. Holiday Co., 1996 WL 653974, at *4 (Minn.App.1996).

In this case, Ortho had a published policy against sexual harassment. After hearing Todd's complaint, Ball and Mangean expressed shock and sympathy, asked Todd what she would like them to do, offered to move her to another

hotel room, and helped her return home. In Minnesota, Ortho offered to pay Todd's uninsured therapy costs (which she declined); urged her to move her therapy day to a work day, with full pay; and granted her substantial paid leave. Ortho's senior management confronted Moreland when he returned from the sales conference, investigated Todd's complaint thoroughly, and fired Moreland when Todd's complaint was found to be credible. These actions are similar to employer responses the Minnesota courts have found to be timely and appropriate remedial action. See Fore, 509 N.W.2d at 561; Schlitz, 1996 WL 653974 at *4.

[12][13][14] The district court concluded that Ortho did not take timely and appropriate remedial action primarily for three reasons: its investigation of Todd's complaint took thirty days, Moreland was given a valuable severance package when terminated, and Todd's subsequent requests for transfer and additional leave were not accommodated. In our view, these facts do not justify rejecting the jury's finding of timely and appropriate remedial action. When confronted, Moreland vigorously denied Todd's allegations. He accused Ortho of race discrimination when it credited Todd's version of the events in question and threatened litigation if he was terminated. Ortho cannot be faulted for carefully investigating two conflicting versions of a serious incident that could not be independently corroborated. As Judge Edith Jones explained in Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309- 10 (5th Cir. 1987):

> Since the demise of the institution of dueling, society has seldom provided instantaneous redress for dishonorable conduct.... Ordinarily, an organization requires time to respond to embarrassing, emotional and often litigation-spawning claims of sexual harassment. Careers and corporate image rest on the company's handling of such charges.... [O]ne cannot reasonably demand the employer to

ignore its experience with the alleged offender or to examine a charge of sexual harassment based on one side of the story, in a vacuum.

Likewise, we do not fault Ortho for its decision to buy peace with Moreland with a severance package. By terminating this high-ranking minority employee with two decades of experience and no complaints on his record on the ground that he sexually harassed a relatively new employee, Ortho showed its commitment to preventing sexual harassment in its workplace, not timidity in the face of controversy. See Sims v. Brown & Root Indus. Servs., Inc., 889 F.Supp. 920, 930-31 (W.D.La.1995), aff'd, 78 F.3d 581 (5th Cir.) (table), cert. denied, --- U.S. ---, 117 S.Ct. 68, 136 L.Ed.2d 29 (1996). Finally, Ortho's failure to accommodate Todd's later requests for a transfer from Minnesota to Houston and for a lengthy personal leave, and her complaint that some at Ortho treated her as a non-person," cannot nullify Ortho's timely and appropriate remedial action in response to her complaint of sexual harassment. These subsequent events occurred months after the Moreland assault and were the basis for Todd's separate Title VII claim of unlawful retaliation. The jury found that Ortho did not retaliate.

The judgment of the district court is reversed and the case is remanded with instructions to enter judgment dismissing the complaint. Because Todd is no longer a prevailing party, the district court's award of attorney's fees must be vacated. See 42 U.S.C. § 2000e-5(k); Minn.Stat. § 363.14, subd.3.

RICHARD S. ARNOLD, Chief Judge, concurring.

The Court rightly cites, as one of the principal authorities justifying its decision, ***740** Davis v. City of Sioux City, 115 F.3d 1365 (8th Cir.1997). I dissented in that case, id. at 1369,

but I am now bound by it. I therefore concur in the opinion of the Court.

END OF DOCUMENT

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**
**THIRD DIVISION**

---

Lori A. Todd,

Plaintiff, Civ. No. 3-94-402

vs.

**ORDER**

Ortho Biotech, Inc.,

Defendant.

---

Lindquist & Vennum, P.L.L.P., David A. Allgeyer and Ansis V. Viksnins, Minneapolis, MN appeared for and on behalf of plaintiff.

Maslon Edelman Borman & Brand, P.L.L.P., Howard B. Tarkow, Susan E. Oliphant and James F. Hanneman, Minneapolis, MN appeared for and on behalf of defendants.

---

This matter came before the Honorable Michael J. Davis, United States District Court Judge for jury trial. The jury rendered its verdict on June 23, 1995. Pursuant to the Special Verdict form dated June 23, 1995 and upon all the files, records and proceedings herein, **IT IS HEREBY ORDERED:**

1. Judgment be entered in favor of defendant as to plaintiff's claims of negligent retention (Count IV).

2. Judgment be entered in favor of defendant as to plaintiff's claims of negligent supervision (Count III).

3. Judgment be entered in favor of defendant as to plaintiff's claims of assault (Count VI)).

4. Judgment be entered in favor of defendant as to plaintiff's claims of battery (Count VI).

5. Judgment be entered in favor of defendant as to plaintiff's claims of false imprisonment (Count IX).

6. Judgment be entered in favor of defendant as to plaintiff's claims of intentional infliction of emotional distress (Count VII).

7. Judgment be entered in favor of defendant as to plaintiff's claims of retaliation (Count II).

8. Judgment in the amount of two hundred eighteen thousand ($218,000) be entered in favor of plaintiff on her claims of sexual harassment (Count I).

9. Plaintiff's claim of negligent hiring (Count V) is DISMISSED with prejudice.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: 6-23-95

/s/
MICHAEL J. DAVIS, Judge
United States District Court

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

Lori A. Todd,

Plaintiff, Case No. Civil 3-94-402

v. **JUDGMENT IN A CIVIL CASE**

Ortho Biotech, Inc.

Defendant.

---

( ) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that judgment be entered in favor of the defendant as to plaintiff's claims of negligent retention (Count IV), negligent supervision (Count III), assault (Count VI), battery (Count VI), false imprisonment (Count IX), intentional infliction of emotional distress (Count VII), and retaliation (Count II). Judgment in the amount of $218,000.00 is entered in favor of plaintiff on her claim of sexual harassment (Count I). Plaintiff's claim of negligent hiring (Count V) is dismissed with prejudice.

DATE: June 23, 1995.

FRANCIS E. DOSAL, CLERK

/s/

Patricia J. Sabin, Deputy Clerk

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**
**THIRD DIVISION**

---

LORI A. TODD,

Civil File No. 3-94-402

Plaintiff,

**MEMORANDUM AND ORDER**

vs.

ORTHO BIOTECH, INC.,

Defendant.

---

David A. Allgeyer and Ansis V. Viksnins of Lindquist & Vennum, P.L.L.P. appeared on behalf of plaintiff.

Howard B. Tarkow, Susan E. Oliphant and James F. Hanneman of Maslon Edelman Borman & Brand, P.L.L.P appeared on behalf of defendant.

---

This matter came before the Honorable Michael J. Davis on July 10, 1995 on defendant, Ortho Biotech, Inc.'s ("defendant") motion for judgment as a matter of law. Plaintiff, Lori A. Todd ("plaintiff") also moves the Court to amend its judgment to enter findings of fact and conclusions of law and award attorneys' fees and costs. For the reasons set forth below, defendant's motion is denied. Plaintiff's motions to amend judgment is granted. Plaintiff's motion for attorneys' fees and costs is granted in part and denied in part.

## FACTUAL BACKGROUND

Defendant is a subsidiary of Johnson & Johnson and employs approximately 425 people, a third of whom work as sales personnel. In 1974, James Moreland commenced employment with Johnson & Johnson and was thereafter promoted to upper management. From 1988 to approximately September 1992, Moreland worked as defendant's National Sales Manager with responsibility for defendant's entire sales organization, including plaintiff. According to plaintiff, Moreland was responsible for the hiring and firing of product specialists such as plaintiff and reviewed compensation decisions. In fact, Moreland approved plaintiff's hire, relocation to the Rochester, Minnesota territory, her rate of compensation, and her request for a salary advance.

On August 24, 1992, Moreland received a lateral position as National Director of Trade Relations in which he maintained the same rank in defendant's employ with the identical salary and perks. His new duties included setting national sales policies and interacting with key accounts, drug wholesalers and product specialists. According to defendant, Moreland was "stripped" of all personnel authority over defendant's sales force; plaintiff understood, however, that Moreland would continue to exercise direct and indirect supervisory functions over her. In fact, Moreland informed plaintiff that he would continue to actively work with product specialists in his new role.

From September 20-24, 1992, defendant held its national sales conference at the Boston Marriott hotel at which attendance for all defendant's sales staff was mandatory. During that conference, on September 21, 1992, Moreland and two other product specialists invited plaintiff to accompany them to a nearby jazz club. Although she was initially hesitant, plaintiff decided to join them. When they

arrived at the jazz club, it was closed so the group decided to go to a nearby bar.

Upon their return to the hotel, Moreland followed plaintiff into an unoccupied elevator, grabbed her, and attempted to kiss her. Plaintiff resisted and Moreland apologized. He then explained that he wanted to further "apologize" in his room. According to plaintiff, she feared upsetting and alienating Moreland and felt that Moreland was sincere in his desire to apologize. Upon entering Moreland's room, Moreland grabbed plaintiff and attempted to rape her. Plaintiff eventually escaped.

Upon learning of this incident, defendant alleges that it gave plaintiff an indefinite paid leave of absence and conducted an investigation with all persons believed to have knowledge of the incidents. Plaintiff also filed a sworn statement attesting to Moreland's assault. The day after defendant received her statement, defendant terminated Moreland.

At the conclusion of the trial, the jury found, according to Special Verdict Interrogatory No. 13, that Moreland was a supervisor for purposes of Title VII and used his actual or apparent authority to harass plaintiff or otherwise aided in accomplishing his harassment by virtue of his position. The jury subsequently awarded plaintiff damages in the amount of $218,000.

## DISCUSSION

### Defendant's Motion for Judgment As A Matter of Law

Defendant argues that the Court should set aside the jury verdict because the jury utilized an erroneous legal standard in rendering its decision to award plaintiff damages. Defendant further argues that the jury erred in finding that Moreland

used his authority to sexually harass plaintiff because he was not her direct supervisor at the time of the incident.

Pursuant to rule 50 of the Federal Rules of Civil Procedure, a party is entitled to judgment as a matter of law:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

In ruling upon a motion for judgment as a matter of law, a court must: (1) consider the evidence in a light most favorable to the prevailing party; (2) assume that all conflicts were resolved in favor of the prevailing party; (3) assume as proved all facts that the prevailing party's evidence tended to prove; and (4) give the benefit of all favorable inferences that may reasonably be drawn from the facts proved to the prevailing party. TEC Floor Corp. v. Wal-Mart Stores, Inc., 4 F.3d 599 (8th Cir. 1993) (citing Western Am., Inc. v. Aetna Cas. and Sur. Co., 915 F.2d 1181, 1183 (8th Cir. 1990)).

A.

Instruction No. 37 of the jury instructions stated that defendant cannot escape liability by promptly taking some after-the-fact remedial action when Moreland assaulted plaintiff. Based upon this instruction and the jury's finding that Moreland used his apparent authority to sexually harass plaintiff, the jury awarded plaintiff damages. Defendant argues that this instruction and finding contravenes the well-

settled law in the Eighth Circuit regarding an employer's liability based upon the acts of one of its supervisors.

The starting point of the Court's analysis of this issue rests with the United States Supreme Court decision in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) where the Court held that a claim of "hostile environment" sexual harassment is a form of sex discrimination actionable under Title VII of the Civil Rights Act of 1964. Although the Supreme Court declined to articulate a bright-line test for employer liability under hostile environment sexual harassment, the Court did hold that lower courts should look to "traditional agency principles" in determining whether the employer/principal is liable for the acts of its agent. "While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." Id. at 70.

With this frame of reference, a number of lower courts in various circuits have addressed the issue of hostile environment harassment and, pursuant to the Supreme Court's instruction, have examined the position of the perpetrator in determining employer liability. See e.g., Karibian v. Columbia University, 14 F.3d 773, 780 (2d Cir. 1994), cert. denied, 114 S.Ct. 2693 (1994) ("We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship."); Kotcher v. Rosa and Sullivan Appliance Center, Inc., 957 F.2d 59, 64 (2d Cir. 1992) ("At some point, even under the Vinson dichotomy between the quid pro quo claims and hostile work environment claims, the actions of a supervisor at a

sufficiently high level in the hierarchy would necessarily be imputed to the company."); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417 (10th Cir. 1987) (relying upon Meritor Savings Bank v. Vinson, Court held employer liable where supervisor purported to act on behalf of employer and there was reliance upon apparent authority). These cases, along with a number of other decisions, reflect an effort by many courts to comport with the Supreme Court's intent to incorporate agency principles in adjudicating Title VII cases.

Defendant argues that the Court should have adopted its instruction which did not distinguish between supervisory and non-supervisory perpetrators of hostile environment sexual harassment. This instruction, defendant argues, "is consistent with Eighth Circuit law." In support of this contention, defendant relies in part upon Davis v. Tri-State Mack Distributors, Inc., 981 F.2d 340 (8th Cir. 1992) and Kopp v. Samaritan Health Sys., 13 F.3d 264, 266 (8th Cir. 1993). But as defendant admits, neither of these cases even addressed the issue of supervisor versus co-worker hostile environment sexual harassment. In fact, defendant cites no Eighth Circuit case which has directly addressed the issue of supervisor hostile work environment sexual harassment.

Defendant also urges the Court to rely upon the Sixth Circuit's decision in Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir. 1992), cert. denied, 113 S.Ct. 831 (1992) which defendant alleges was cited with approval by the Eighth Circuit in Davis. But the plain language of Kauffman explicitly recognizes the distinction between co-worker hostile work environment cases and supervisor hostile work environment cases. Id. at 182. The Kauffman Court observed that establishing co-worker discrimination requires a showing that the employer knew or should have known of the sexual harassment and failed to implement prompt action. Id. The Court further stated, however, that "[U]se of the phrase "respondeat superior" is typically associated with the co-

worker "knew or should have known" standard. A different but closely related standard of general agency applies in supervisor harassment cases." Id.

The Kauffman Court then set forth a legal framework for assessing hostile work environment claims encompassing two inquiries: (1) whether the supervisor's actions were foreseeable or fall within the scope of his employment; and (2) even if they were, whether the employer responded adequately and effectively to negate liability. Id. at 184. The Court found that, because the employer had responded effectively, it was insulated from liability. Id. at 185.

This Court declines to adhere to the legal framework set forth by the Sixth Circuit. The Kauffman jurisprudence fails to adhere to the reasoning and holdings elicited by a number of other Circuits, including the Second, Third, Tenth and Eleventh, as well as a number of lower courts which have all held that, under certain circumstances, an employer can be held absolutely liable if a supervisor uses actual or apparent authority to harass an employee. See supra; Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993); Levendos v. Stern Entertainment, Inc., 909 F.2d 747, 752 (3rd Cir. 1990); Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503, 1512 (11th Cir. 1989), cert. denied, 115 S.Ct. 1110 (1995).[1] As the Court in Karibian v. Columbia University, 14 F.3d 773, 779 (2d Cir. 1993) stated:

> A rule of employer liability deriving from traditional agency principles cannot be reduced to a universal, pat formula. It will certainly be relevant to the analysis, for

---

[1] In fact, the Sixth Circuit has recognized the disparity between the Kauffman decision and other Circuits addressing this issue. Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 803 (6th Cir. 1994). "Not all courts read [Meritor Savings Bank, FSB v.] Vinson as affording employers an opportunity to avoid liability by effectively responding to the sexual harassment actions of their supervisors."

> example, that the alleged harasser is the plaintiff's supervisor rather than her co-worker... Common law principles of agency suggest that in such circumstances the employer's liability is absolute... Hence, when a supervisor makes employment decisions based on an employee's response to his sexual overtures, it is fair to hold the employer responsible because "the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer."

(quoting Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982)). In the Court's view, these other Circuit decisions give full effect to the Supreme Court's caveat that lower courts examine "traditional agency principles" in determining employer liability. Vinson, 477 U.S. at 70. As the Vance Court stated, "[W]here a plaintiff's alleged harasser acts as an agent of the employer, the harasser is the employer for purposes of Title VII. "This liability is direct; the employer cannot find shelter in the claim that it neither had notice of, or approved of, the unlawful conduct."" 863 F.2d at 1514 (citing Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988); 29 C.F.R. § 1606.8(c) (1988); quoting Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987)) (emphasis added).

The decision of the Court does not undermine the Eighth Circuit's long-standing requirement that a plaintiff demonstrate an employer's failure to take proper remedial action in order to succeed upon a hostile environment sexual harassment claim. The decision merely adopts a limited exception articulated by number of recent decisions in other Circuits which, unlike the Eighth Circuit, have had occasion to address the issue of supervisory hostile environment sexual harassment. This decision does not exempt low-level supervisors who do not rely on their supervisory authority or

co-workers from demonstrating an employer's failure to take prompt and remedial action. Karibian, 14 F.3d at 779.

**B.**

Having set forth the standard, the Court now turns to the issue of whether Moreland possessed the actual or apparent authority to be deemed a supervisor. The Court finds that the jury did not err in finding that Moreland used his actual or apparent authority or was otherwise aided in accomplishing the harassment by virtue of his supervisory powers. Defendant alleges that it removed Moreland as its National Sales Manager in August 24, 1992 and appointed him National Director of Trade Relations. Under his new title, defendant alleges that Moreland lost his supervisory authority or control over defendant's sales employees and had no decision-making regarding the hiring, firing, promoting or compensation of the sales staff.

Defendant fails to point out, however, that the change in position was merely a lateral move in which Moreland retained the same rank in the company with the same benefits. The jury heard testimony from the human resources department that both positions were at management level in which Moreland was one step below the President of the company. Plaintiff alleges that Moreland and Thomas Amick were the "two top people in sales" and reported directly to the Vice President and President of Ortho Biotech. Plaintiff further alleges that Moreland's duties included interaction with the sales staff. In fact, Moreland himself specifically informed plaintiff that he would still actively work with product specialists in his new role. Plaintiff thus understood that Moreland would continue to exercise direct and indirect supervisory functions over her and other product specialists.

These facts construed in a light most favorable to plaintiff provide ample evidence to support the jury's finding that

Moreland acted under apparent authority or was otherwise aided in accomplishing the harassment by virtue of his authority. For purposes of Title VII, a manager need not have direct authority over an employee to be deemed a "supervisor/agent." Vance, 863 F.2d at 1514-1515. Although direct authority is relevant, the Court should also examine any evidence bearing upon the overall structure of the workplace, including the relative positions of the parties involved. Id. (citing EEOC Guidelines, 29 C.F.R. § 1606.8(c) (1988); Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986)).

An examination of the totality of the circumstances reveals that the jury's finding was not flawed. As National Director of Trade Relations, Moreland was among the highest ranking members of the 425-person company. Even though he may not have had any direct authority over plaintiff at the time of the incident, Moreland did have such authority approximately one month before the incident occurred. Moreland also stated to plaintiff that he would continue to interact with the product specialists. Under these circumstances, it was more than reasonable for the jury to infer that Moreland could easily influence all facets of plaintiff's career at Ortho Biotech by virtue of his top management position.[2] The record also shows that plaintiff submitted to Moreland's request to "apologize" in his hotel room in part because she did not want to upset or alienate Moreland and detrimentally impact her career. Defendant's arguments are without merit.

---

[2] In fact, during the night that Moreland attempted to rape plaintiff, Moreland began to insist at the bar that he wear plaintiff's baseball cap. The other product specialists told plaintiff that she should comply with this request given Moreland's status in the company.

Plaintiff's Motion for Attorneys' Fees and Costs

The Court finds that plaintiff is entitled to most of its attorneys' fees and costs expended in this litigation. Pursuant to 42 U.S.C. § 2000e-5(k) and the Minnesota Human Rights Act, Minn. Stat. § 363.14 subd. 3, a prevailing party is entitled to an award of reasonable attorney fees and expenses. A prevailing party is one who succeeds "on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

The Court's assessment of the attorneys' fees and costs incurred in this case reveal that they are reasonable. A reasonable fee is one that attracts competent counsel, but does not produce windfalls to the attorneys. McDonald v. Armontrout, 860 F.2d 1456, 1458 (8th Cir. 1988). The hours expended in this case are not excessive and plaintiff alleges that it has deducted those hours dedicated to unsuccessful discovery motions and hearings. In determining a reasonable rate, the Court examines what is the custom for an attorney's fees in the same or similar community. Blum v. Stenson, 465 U.S. 866, 895-96 n. 11 (1985). A review of plaintiff's accompanying affidavits reveals that the rates of the attorneys in this case are at or below market rates of similarly situated attorneys in the Twin Cities. Affidavit of Douglas A. Hedin, p. 5.

The Court does not find, however, that plaintiff is entitled to a 30% enhancement of its attorneys' fees. As stated by the Eighth Circuit, the lodestar amount is presumptively a reasonable fee which incorporates most factors relevant to determining the amount of attorneys' fees. Hendrickson v. Branstad, 934 F.2d 158, 162 (8th Cir. 1991) (citing Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 565 (1986)). The results achieved and the contingent nature of payments are also reflected in the

lodestar. Id. Additionally, the record reflects that plaintiff did not succeed upon a number of her claims including retaliation, negligence, and intentional torts. Thus, the Court does not find that this case constitutes one of those "rare" and exceptional" cases which merit enhancement.[3] Id.

## ORDER

Based upon the foregoing files, records and proceedings, it is HEREBY ORDERED that:

1. Defendant's Motion for Judgment As a Matter of Law is denied.
2. Plaintiff's Motion to Amend Judgment is granted. The Findings of Fact and Conclusions of Law will be set forth in a subsequent memorandum.
3. Plaintiff's Motion for Attorneys' Fees and Costs is granted in part. Plaintiff is entitled to recoup its lodestar amount of $182,726.55 in interim attorneys' fees and $24,820.69 in interim costs and disbursements for a total of $207,572.24.

Dated: 3-29-96

/s/

Honorable Michael J. Davis
United States District Court

[3] The Court's refusal to grant an enhancement does not mean, however, that plaintiff should not recover its lodestar attorneys' fees for plaintiff's unsuccessful claims. As the Eighth Circuit stated in Casey v. City of Cabool, 12 F.3d 799, 806 (8th Cir. 1993), cert. denied, 115 S.Ct. 325 (1994), "Once a party is found to have prevailed, "[a] fee award should not be reduced merely because a party did not prevail on every theory raised in the lawsuit." (quoting Hendrickson, 934 F.2d at 164).

949 F.Supp. 724
75 Fair Empl.Prac.Cas. (BNA) 1538
**(Cite as: 949 F.Supp. 724)**
**< KeyCite Red Flag>**

**Lori A. TODD, Plaintiff,**
**v.**
**ORTHO BIOTECH, INC., Defendant.**

**Civil File No. 3-94-402.**

United States District Court,
D. Minnesota,
Third Division.

Nov. 22, 1996.

A female former employee brought action against her former employer for sexual harassment and retaliation discrimination in violation of Title VII and the Minnesota Human Rights Act and other related claims. The District Court, Davis, J., held that: (1) former employee established case of sexual harassment against her employer under the Minnesota Human Rights Act; (2) employer was liable for sexual harassment by its upper level manager; (3) employer was liable because it knew or should have known of sexual harassment and failed to take prompt and effective remedial action: (4) treble damages were necessary to compensate employee for severe and debilitating effects of sexual harassment and past and future wage loss she suffered; (5) employee was entitled to damages for mental anguish or suffering she experienced as result of sexual harassment in amount of $90,000; (6) employer was liable for civil penalty in amount of $50,000 for violating the Minnesota Human Rights Act; and (7) employee was entitled to award of reasonable attorney fees and costs.

So ordered.

**[1] CIVIL RIGHTS 167**
78k167
Female former employee established that she was subjected to sexual harassment by her employer in violation of the Minnesota Human Rights Act, where, based on her status as woman, she belonged to class of persons protected by the Act, she was subjected to unwelcomed sexual harassment by employer's upper level manager and sexually offensive skit, because of sexual harassment, she was unable to work, and harassment that she suffered was sufficiently severe to affect term, condition, or privilege of employment. M.S.A. § 363.031, subd. 41.

**[2] CIVIL RIGHTS 451**
78k451
Employer was liable under the Minnesota Human Rights Act for sexual harassment of female employee that was perpetrated by its upper level manager, who used his actual or apparent authority to further his sexual harassment and was aided in accomplishing harassment because of his position. M.S.A. § 363.031, subd. 41.

**[3] CIVIL RIGHTS 167**
78k167
Knowledge of sexual harassment of female employee by upper level management in violation of Minnesota Human Rights Act was imputed to employer. M.S.A. § 363.031, subd. 41.

**[4] CIVIL RIGHTS 167**
78k167
Employer was liable for sexual harassment of female employee in violation of the Minnesota Human Rights Act based on its failure to take prompt and remedial action to stop sexual harassment, remedy its resulting effects on employee, and generally deter harassment in its workplace; after sexual assault, employee was subjected to viewing sexually offensive employer-sponsored skit, even after she tried to report harassment, harasser approached her at conference and called her in her hotel room, and employer denied accommodations employee needed to deal with her trauma even after concluding that its upper level manager attempted to rape her. M.S.A. § 363.031, subd. 41.

**[5] CIVIL RIGHTS 403**
78k403
Female former employee sustained compensatory damages from sexual harassment by upper level manager of her former employer in amount of $100,000 for loss of earnings and $28,000 for loss of earning capacity. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e-2.

**[6] CIVIL RIGHTS 454**
78k454
Treble damages under the Minnesota Human Rights Act were necessary to compensate female former employee for severe and debilitating sexual harassment by upper level manager of her former employer and past and future wage loss that she suffered. M.S.A. §§ 363.071, subd. 2, 363.14, subd. 2.

**[7] CIVIL RIGHTS 454**
78k454
Treble damages under the Minnesota Human Rights Act are fixed multiple of compensatory damages and are not related to

culpability of employer. M.S.A. §§ 363.071, subd. 2, 363.14, subd. 2.

**[8] CIVIL RIGHTS 454**

78k454

In deciding whether to award treble damages for violation of Minnesota Human Rights Act, consideration must be given to whether multiple is necessary to fully compensate victim. M.S.A. §§ 363.071, subd. 2, 363.14, subd. 2.

**[9] CIVIL RIGHTS 454**

78k454

Female former employee was entitled to damages for mental anguish or suffering she experienced as result of sexual harassment by former employer's upper level manager in amount of $90,000. M.S.A. § 363.031, subd. 41.

**[10] CIVIL RIGHTS 471**

78k471

Employer would be assessed civil penalty in amount of $50,000 for violating Minnesota Human Rights Act based on its liability for sexual harassment by its upper level manager. M.S.A. § § 363.071, subd. 2, 363.14, subd. 2.

**[11] CIVIL RIGHTS 411**

78k411

Female former employee was entitled to award of reasonable attorney fees and costs for bringing sexual harassment claim against her former employer under Title VII and the Minnesota Human Rights Act. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e-2; M.S.A. § 363.14, subd. 3.

**[11] CIVIL RIGHTS 455**

78k455

Female former employee was entitled to award of reasonable attorney fees and costs for bringing sexual harassment claim against her former employer under Title VII and the Minnesota Human Rights Act. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e-2; M.S.A. § 363.14, subd. 3.

***726** David A. Allgeyer and Ansis V. Viksnins of Lindquist & Vennum, P.L.L.P., Minneapolis, MN, for plaintiff.

Howard B. Tarkow, Susan E. Oliphant, and James F. Hanneman of Maslon, Edelman, Borman & Brand, P.L.L.P., Minneapolis, MN, for defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR AMENDED JUDGMENT

DAVIS, District Judge.

The above-entitled matter came on for trial before the undersigned on June 12-23, 1995. Plaintiff brought this action alleging nine different counts based on the sexual assault she suffered on September 22, 1992, by defendant Ortho Biotech, Inc.'s National Director of Trade Relations and former National Sales Manager. Plaintiff's case was tried before a jury on the following claims:

1. Sexual harassment under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2;
2. Retaliation discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e3(a);
3. Negligent supervision;
4. Negligent retention;
5. Negligent hiring;
6. Assault;

7. Battery;
8. False Imprisonment; and
9. Intentional infliction of emotional distress.

In addition, plaintiff's claims for sexual harassment and retaliation discrimination under Minn.Stat. §§ 363.01, subd. 41, 363.03, subd. 7 were tried to the Court.

After carefully considering the evidence at trial and the legal arguments made, and based upon observation of the witnesses and their credibility, the Court now makes and enters the following findings of facts, and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

## FINDINGS OF FACT

1. Defendant Ortho Biotech, Inc. ("Ortho") is a New Jersey Corporation with its principal place of business in Rariton, New Jersey. It is a subsidiary of Johnson & Johnson, a well known manufacturer and marketer of diverse medical products.

2. Plaintiff Lori Todd ("Ms. Todd") was hired by Ortho as a sales representative-product specialist in March, 1992.

3. Ortho sponsored a national sales meeting in Boston, Massachusetts during the period from September 20-24, 1992. Ms. Todd, an Ortho product specialist of only six months, attended the meeting. Attendance at the national meeting was virtually mandatory.

4. At the national sales meeting, Ortho hosted a hospitality suite, which included an open bar. Ms. Todd stopped in at the hospitality ***727** suite on Monday, September 21, 1992, at approximately 11:30 p.m. At the hospitality suite, she was

approached by Greer Jattan and Rob Gist, who were also product specialists at Ortho, and James Moreland ("Moreland"), a high ranking executive at Ortho, about going to a nearby jazz club. Moreland had recently been the National Sales Manager for the Company and had recently been laterally transferred to the position of National Director of Trade Relations. Ms. Todd agreed to go to the jazz club. The theme of the meeting hosted by Ortho, was "Connections," and Ortho employees and managers were encouraged to "get to know one another."

5. The jazz club was closed. At plaintiff's suggestion the group proceeded to the Rattlesnake Bar to continue the evening. At the Rattlesnake, Moreland began drinking shots of Vodka. He and Ms. Todd exchanged sexually oriented jokes. He and Ms. Todd also discussed Ms. Todd's career goals and how he would be interacting with product specialists such as Ms. Todd in the future.

6. During the cab ride back to the hotel, Moreland whispered something into Ms. Todd's ear which she could not understand. She ignored him.

7. When they returned to the hotel, Moreland and Ms. Todd were alone in the lobby when their companions left to return to the hospitality suite. They entered an empty elevator together and proceeded to their respective rooms. When the elevator closed, however, Moreland grabbed Ms. Todd, and attempted to kiss her. She pushed him away, asking "What are you doing?" Moreland apologized. He then insisted that Ms. Todd accompany him into his room so that he could complete his apology. Ms. Todd suggested that was unnecessary. Nonetheless, Moreland repeatedly "insisted" she accompany him to hear his apology. Ms. Todd chose to

comply with his request, hoping not to upset an upper level manager.

8. As soon as Ms. Todd entered Moreland's room, Moreland grabbed her, pinned her down, and attempted to rape her. When Ms. Todd began hyperventilating, Moreland relented and she escaped from the room.

9. Early on Tuesday, September 22, plaintiff called her sister in Florida who told her she should report the attack. During the day, plaintiff attended meetings and went shopping with friends. In the evening, she had dinner with another product specialist, Ellen Schoenberg, and told her about the attack. Ms. Schoenberg said she should report the incident, and suggested that she do so, to Chuck Ball, Director of Management Development, whom Ms. Schoenberg trusted.

10. On Wednesday morning, September 23, plaintiff approached Mr. Ball on her way to a business meeting, intending to report the attack. He wanted to talk, but plaintiff said it was a personal matter and she needed privacy. Mr. Ball was tending to conference business at the time. She did not ask Mr. Ball if there was another manager whom she could talk to at that time. Plaintiff did not tell Mr. Ball that she had been attacked or sexually harassed. Instead, they agreed to meet that night at the end of business.

11. Plaintiff attended the scheduled business meetings during the day.

12. In the last of three afternoon breakout sessions, plaintiff watched a skit about Ortho's bonus compensation performed by hired actors. Plaintiff and another product specialist felt the skit was offensive, but they did not complain to anyone.

13. The skit, which was sexually offensive, had a female product specialist pretending to be having sex on the other end of a 900 "dirty talk" number while a male sales manager talked about sales data. The skit also included one participate pinching another participant on the buttocks.

14. The evening of September 23, Chuck Ball and plaintiff met in her room. Plaintiff told Mr. Ball that Moreland had attacked her. Mr. Ball was shocked and listened sympathetically. He said he would do anything he could to help her and that he wanted to make her safe and that she would be protected. Mr. Ball then asked her for permission to involve Mr. Mangean to hear the allegations and determine the options for proceeding. She agreed.

15. Mr. Mangean arrived in the room and plaintiff repeated the story. She also showed ***728** him bruises on her upper arms. Mr. Mangean said it appeared that a law had been violated and she had the right to contact the police. She did not want to do so. Mr. Mangean told her he needed to contact the company's attorney because he was concerned that a crime may have been committed. She agreed only that the company's attorney could be notified. She wanted nothing else done and she did not want Mr. Mangean to tell anybody else in the company about Moreland's alleged assault, including Moreland's superiors.

16. Mr. Mangean and Mr. Ball then asked her what she wanted to do. She said she wanted to go down to the dinner, so they escorted her and promised her they would sit where they could keep an eye on both her and Moreland. Mr. Ball also told her that, when she was ready to leave the dinner, he would escort her to her room.

17. After the dinner, plaintiff also reported to Mr. Hess that Moreland had attacked her.

18. In her room, plaintiff received a brief call from Moreland. She called Mr. Ball, who offered to arrange for her to move to another room if it would help her to feel safer. She said she felt safe in the room. That was plaintiff's last contact ever with Moreland.

19. Ms. Todd returned to Minnesota on September 24. Upon her return to Minnesota, Ms. Todd obtained medical attention. This medical attention included treatment for severe psychological problems resulting from the assault by Moreland, medication for anxiety and depression (that Ms. Todd took for over a year), and emergency room treatment at Abbott Northwestern Hospital.

20. On its Special Verdict form dated June 2 1995, the jury found that Moreland used his actual or apparent authority at Ortho to further his harassment of Ms. Todd, or that he was otherwise aided in accomplishing his harassment by virtue of the position he had with Ortho.

21. The Court also finds that Moreland used his actual or apparent authority as an upper level manager at Ortho to further his harassment of Ms. Todd, or that he was otherwise aided in accomplishing his harassment by virtue of the position he had with Ortho.

22. While the jury concluded that Ortho did not fail to take proper and effective remedial action, for the following reasons the Court finds that, while Ortho took action, its action was not prompt and effective on Ms. Todd: (a) Following the assault, Moreland harassed other Ortho female employees. (b) Even after Ms. Todd tried to report the assault, Moreland

approached her at lunch and, after Ms. Todd made a full report to Ball and Mangean, Moreland called her in her hotel room, thereby greatly upsetting her. (c) Ms. Todd's first attempt to report the assault to Ball was delayed because he was busy coordinating the sexually offensive skit. When she was finally able to report the assault to Ball, Ms. Todd learned that he was not involved in such matters. (d) Ortho took approximately three weeks to determine that Moreland had, in fact, attempted to rape Ms. Todd, and failed to keep Ms. Todd informed of the investigation. (e) Ms. Todd was told that Moreland had been suspended pending the investigation, but in actuality that was not so. (f) Although Moreland was the harasser, during its investigation, Ortho pulled Ms. Todd's criminal record from her personnel file, but never conducted a criminal background check on Moreland. (g) Even after Ortho concluded that Moreland had nearly raped Ms. Todd, it provided Moreland with a significant severance package worth over $100,000 in cash, while taking various adverse actions against Ms. Todd.

23. The various adverse actions included the following: At a June 1993 sales meeting, Tom Amick, Ortho's new National Sales Manager, refused to shake Ms. Todd's outstretched hand and refused to make eye contact. Other Ortho employees avoided and ignored Ms. Todd after she reported the assault. Ms. Todd sought to extend an unpaid leave of absence because she was not ready to return to work. Although Ortho had granted a six-month extended unpaid leave of absence to another Ortho employee, Ortho denied Ms. Todd's request contending that she had quit when she had not returned to work on the date that Ortho wanted her to ***729** return and claiming that her sales territory was very important to Ortho, even though Ortho dissolved the territory three months after Ms. Todd's departure from the company.

24. As a result of the sexual assault by Moreland and as a result of Ortho's actions, Ms. Todd has suffered past and future wage loss and pain, emotional distress and loss of enjoyment of life. Because of the need for extensive psychological treatment, including medication, Ms. Todd was unable to work full-time at Ortho after September of 1992, and eventually found herself unable to work at all. She subsequently moved in with her sister and brother-in-law in Houston and recently moved with them to Florida. While Ms. Todd has tried to start a business from her home, thus far she has been unable to get on with her life. As a direct and proximate result of the attempted rape, Ms. Todd has suffered vivid and terrifying nightmares, anxiety, phobias and other extreme psychological difficulties, including post-traumatic stress disorder. She is unable to maintain meaningful new personal relationships, travel, or work at gainful employment.

## CONCLUSIONS OF LAW

[1] 1. Ms. Todd has established a case of sexual harassment against Ortho pursuant to the Minnesota Human Rights Act, Minn.Stat. § 363.01, subd. 41. In analyzing cases under the Minnesota Human Rights Act, courts look to Title VII precedent. Fore v. Health Dimensions, Inc., 509 N.W.2d 557, 560 (Minn.Ct.App.1993).

(A) Based on her status as a woman, Ms. Todd belongs to a class of persons protected by the Minnesota Human Rights Act.

(B) Ms. Todd was subjected to unwelcome sexual harassment including the brutal attempted rape perpetrated by Ortho's upper level manager and the sexually offensive skit.

(C) The sexual harassment experienced by Ms. Todd was based upon her sex.

(D) The sexual harassment experienced by Ms. Todd affected terms, conditions, and privileges of her employment. As a

result of the sexual harassment, Ms. Todd was unable to work full-time at Ortho, and eventually found herself unable to work at all.
(E) The sexual harassment suffered by Ms. Todd was sufficiently severe to affect a term, condition, or privilege of employment.

[2] 2. Ortho is liable for the sexual harassment perpetrated by Moreland, its upper level manager. Moreland used his actual or apparent authority at Ortho to further his sexual harassment of Ms. Todd, or he was otherwise aided in accomplishing harassment by virtue of the position he had with Ortho. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 72, 106 S.Ct. 2399, 2408, 91 L.Ed.2d 49 (1985); Karibian v. Columbia University, 14 F.3d 773, 780 (2d Cir.1994) (citing Restatement (Second) of Agency §§ 219(1) & (2)(d)), cert. denied, 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824 (1994); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1418 (10th Cir.1987); Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503, 1514-15 (11th Cir.1989); Kay v. Peter Motor Co., Inc., 483 N.W.2d 481, 485 (Minn.Ct.App. 1992).

[3][4] 3. Alternatively, Ortho is liable for the sexual harassment perpetrated by Moreland because it knew or should have known of the sexual harassment and failed to take prompt and effective remedial action. See Bersie v. Zycad Corp., 417 N.W.2d 288, 291 (Minn.Ct.App.1987). Because Moreland was an upper level manager and perpetrator of the harassment, knowledge of the sexual harassment is imputed to Ortho. See Giuliani v. Stuart Corp., 512 N.W.2d 589, 595 (Minn.Ct.App.1994); McNabb v. Cub Foods, 352 N.W.2d 378 (Minn.1984). Ortho failed to take prompt and effective remedial action to stop the sexual harassment, remedy its resulting effects on Ms. Todd, and generally deter harassment in its workplace. See McNabb v.

Cub Foods, 352 N.W.2d 378, 384 (Minn.1984) (while the employer's transfer of the plaintiff to a new location ended the harassment by the original harassers, it did nothing to reduce the possibility that the plaintiff would be harassed at the new location or to eliminate the hostile working environments Fuller v. City of Oakland, 47 F.3d ***730** 1522 (9th Cir.1995) (whether a defendant takes prompt and remedial action to address sexual harassment depends not only on the prevention of future harassment between the particular victim and perpetrator, but also whether the defendant's actions serve as a specific and general deterrent to work place harassment in general). After the sexual assault, Ms. Todd was subjected to viewing a sexually offensive Ortho-sponsored skit. Furthermore, following the assault, Moreland harassed other Ortho female employees, and even after Ms. Todd had tried to report the harassment, Moreland approached her at lunch and called her later in her hotel room. During its three-week long investigation, Ortho failed to keep Ms. Todd informed and misled her into believing that Moreland had been suspended pending the investigation. Although Ms. Todd was the victim, as part of Ortho's investigation, it pulled her criminal record, yet never pulled any criminal record on Moreland. Even after Ortho concluded that Moreland had attempted to rape Ms. Todd, Ortho managers and employees treated her as a nonperson, and Ortho denied Ms. Todd the accommodations she needed to deal with her trauma. Ortho denied Ms. Todd's requests for a transfer and an extended unpaid leave of absence. In contrast, although Ortho ultimately terminated Moreland, it provided him with a significant severance package.

[5] 4. The jury concluded that Ms. Todd has sustained damages as a direct and proximate result of sexual harassment in violation of Title VII of the Civil Rights Act as follows:

$100,000 Loss of earnings
90,000 Pain, emotional distress and loss of enjoyment of life
28,000 Loss of earning capacity

5. The Court concludes that Ms. Todd has sustained damages as a direct and proximate result of sexual harassment in violation of the Minnesota Human Rights Act.

[6][7][8] 6. Under Minn.Stat. §§ 363.14, subd. 2 and 363.071, subd. 2, the Court may award compensatory damages in an amount up to three times the actual damages sustained. Treble damages are a fixed multiple of compensatory damages and are not related to the culpability of the employer. Melsha v. Wickes Companies, Inc., 459 N.W.2d 707, 709 (Minn.Ct.App.1990); Kriss v. Sprint Communications Co., 851 F.Supp. 1350, 136061 (D.Minn. Apr. 1, 1994) (Murphy, J.). Consideration must be given to whether a multiple is necessary to fully compensate the victim. Melsha, 459 N.W.2d at 709; Kriss, 851 F.Supp. at 1360-61. Under the circumstances, treble damages are necessary to compensate Ms. Todd for the severe and debilitating sexual harassment and past and future wage loss she has suffered. Accordingly, Ms. Todd is entitled to compensatory damages in the amount of $384,000 ($128,000 x 3).

[9] 7. The statutory scheme also provides for other damages and recovery of fees. The Court finds that Ms. Todd is entitled to damages for mental anguish or suffering she experienced as a result of the sexual harassment in an amount equal to the jury's determination of $90,000.

[10] 8. The Court is required to assess a civil penalty payable to the State of Minnesota against any defendant found

to have violated the Minnesota Human Rights Act, Minn.Stat. §§ 363.14, subd. 2 and 363.071, subd. 2. The amount of the penalty is determined by "taking into account the seriousness and extent of the violation, whether the violation was intentional, and the financial resources of the [defendant]." Minn.Stat. § 363.071, subd. 2. Based on all of the factors set forth in the Minnesota Human Rights Act, the Court assesses a civil penalty against Ortho in the amount of $50,000.

[11] 9. Finally, the Court concludes that Ms. Todd is entitled to an award of reasonable attorney fees and costs in conjunction with this lawsuit pursuant to Minn.Stat. § 363.14, subd. 3 and Title VII. The exact amount of attorney fees will be calculated by the Court after Ms. Todd's counsel submits an affidavit outlining the costs and fees incurred by Lindquist & Vennum in this matter.

*731 ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Special Verdict form dated June 23, 1995, and all the files, records, and proceedings herein, the Court amends its prior judgment, and IT IS HEREBY ORDERED that:

1. Judgment be entered in favor of defendant as to plaintiff's claim of negligent retention (Count IV);
2. Judgment be entered in favor of defendant as to plaintiff's claim of negligent supervision (Count III);
3. Judgment be entered in favor of defendant as to plaintiff's claim of assault (Count VI);
4. Judgment be entered in favor of defendant as to plaintiff's claim of battery (Count VI);
5. Judgment be entered in favor of defendant as to plaintiff's claim of false imprisonment (Count IX);

6. Judgment be entered in favor of defendant as to plaintiff's claim of intentional infliction of emotional distress (Count VII);

7. Judgment be entered in favor of defendant as to plaintiff's claims of retaliation (Count II);

8. Plaintiff's claim of negligent hiring (Count V) is DISMISSED with prejudice;

9. Judgment in the amount of four hundred seventy-four thousand dollars ($474,000) be entered in favor of plaintiff on her claims of sexual harassment under Title VII of the Civil Rights Act and the Minnesota Human Rights Act (Count I);

10. Defendant shall pay a civil penalty to the State of Minnesota in the amount of $50,000; and

11. Plaintiff shall be awarded reasonable costs and attorney fees. Plaintiff shall submit an itemized application for attorney fees with supporting documents which reasonably detail her fees and costs within 30 days of the entry of the date of this Order. Defendant shall respond within 10 days thereafter.

LET JUDGMENT BE ENTERED ACCORDINGLY.

END OF DOCUMENT

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

Lori A. Todd,

Plaintiff, Case No. Civil 3-94-402

v. **JUDGMENT IN A CIVIL CASE**

Ortho Biotech, Inc.,

Defendant.

---

( ) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that the court amends is prior judgment and it is ordered that:

1. Judgment is entered in favor of the defendant as to plaintiff's claim of negligent retention (Count IV); negligent supervision (Count III; assault (Count VI); battery (Count VI); false imprisonment (Count IX); intentional infliction of emotional distress (Count VII); and retaliation (Count II);

2. Plaintiff's claim of negligent hiring (Count V) is dismissed with prejudice;

3. Judgment in the amount of $474,000.00 is entered in favor of the plaintiff on her claims of sexual harassment under

Title VII of the Civil Rights Act and the Minnesota Human Rights Act (Count I);

4. Defendant shall pay a civil penalty to the State of Minnesota in the amount of $50,000.00; and

5. Plaintiff shall be awarded reasonable costs and attorney fees.

DATE: November 25, 1996.

FRANCIS E. DOSAL, CLERK

/s/
Patricia J. Sabin, Deputy Clerk

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**
**THIRD DIVISION**

---

Lori A. Todd,

Plaintiff,

v.

**ORDER**
File No. 3-94-402

Ortho Biotech, Inc.,

Defendant.

---

This matter is before the Court upon the motion of Plaintiff for additional attorney fees and costs.

Ansis V. Viksnins, Esq., for and on behalf of Plaintiff.

Susan E. Oliphant, Esq., for and on behalf of Defendant.

---

Pursuant to the Court's November 22, 1996 Findings of Fact, Conclusions of Law and Order for Amended Judgment, Plaintiff moves for additional attorney fees and costs pursuant to Minn. Stat. § 363.14, Subd. 3 and Title VII. Counsel for Plaintiff has submitted itemized billing statements for attorney fees and costs incurred from July 19, 1995 through December 6, 1996. The Court has reviewed the request for attorney fees and costs and find that they are reasonable.

IT IS HEREBY ORDERED that Plaintiff's motion for attorney fees and costs is GRANTED. Judgment shall be entered in favor of Plaintiff in the amount of $7,602.70 for attorney fees and $2,265.32 for costs, totaling $9,868.02.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: 1-2-97

/s/

Michael J. Davis
United States District Court

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

Lori A. Todd — Case No. Civil 3-94-402

v. — **JUDGMENT IN A CIVIL CASE**

Ortho Biotech, Inc.

---

( ) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that Plaintiff's motion for attorney fees and costs is granted. Judgment shall be entered in favor of Plaintiff in the amount of $7,602.70 for attorney fees and $2,265.32 for costs, totaling $9,868.02.

DATE: January 2, 1997

FRANCIS E. DOSAL, CLERK

/s/
Victoria Moralez, Deputy Clerk

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 97-1126/1220MNST

| | | |
|---|---|---|
| Lori A. Todd, | * | |
| | * | |
| Appellee, | * | |
| | * | Order Denying Petition for |
| v. | * | Rehearing and Suggestion |
| | * | for Rehearing En Banc |
| Ortho Biotech, Inc., | * | |
| | * | |
| Appellant. | * | |

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion.

The petition for rehearing by the panel is also denied.

April 24, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

---

Lori A. Todd,

Plaintiff,

-v-

Ortho Biotech, Inc.,

Defendant.

Case No. 3-94-402

**SPECIAL VERDICT FORM**

---

**WE, THE JURY** in the above-captioned action, for our Special Verdict, answer the questions submitted to us as follows:

For the purpose of these Special Verdict questions and answers, the following terms have the meanings indicated below:

**"Ms. Todd"** means plaintiff Lori A. Todd;

**"Ortho Biotech"** means defendant Ortho Biotech. Inc.;

**"Mr. Moreland"** means James Moreland.

## NEGLIGENT RETENTION

**QUESTION NO. 1:** During Mr. Moreland's employment with Ortho Biotech, but prior to the attack on plaintiff, did

Ortho Biotech know or should it have known that Mr. Moreland had a propensity for misconduct?

**ANSWER:** Yes____ No_X__

If your answer to Question No. 1 is "Yes", go to Question No. 2. If your answer to Question No. 1 is "No", skip to Question No. 4.

**QUESTION NO. 2:** Did Ortho Biotech fail to act in a reasonable manner under the circumstances to prevent Mr. Moreland's misconduct toward Ms. Todd?

**ANSWER:** Yes____ No____

If your answer to Question No. 2 is "Yes", go to Question No. 3. If your answer to Question No. 2 is "No", skip to Question No. 4.

**QUESTION NO. 3:** Did Ortho Biotech's negligence directly cause Ms. Todd to suffer injury?

**ANSWER:** Yes____ No____

**NEGLIGENT SUPERVISION**

**QUESTION NO. 4:** Did Ortho Biotech fail to act in a reasonable manner under the circumstances to control Mr. Moreland's conduct?

**ANSWER:** Yes____ No_X__

If your answer to Question No. 4 is "Yes", go to Question No. 5. If your answer to Question No. 4 is "No", skip to Question No. 8.

**QUESTION NO. 5:** In attacking Ms. Todd, was Mr. Moreland's conduct within the scope of his employment with Ortho Biotech or outside of the scope of his employment?

**ANSWER:** Within the Scope of His Employment___
Outside the Scope of His Employment___

If your answer to Question No. 5 is "Within the Scope of His Employment", skip to Question No. 7. If your answer to Question No. 5 is "Outside the Scope of His Employment", go to Question No. 6.

**QUESTION NO. 6:** Did Mr. Moreland's attack upon Ms. Todd occur on Ortho Biotech's "premises"?

**ANSWER:** Yes____ No_____

If your answer to Question No. 6 is "Yes", go to Question No. 7. If your answer to Question No. 6 is "No", skip to Question No. 8.

**QUESTION NO. 7:** Did Ortho Biotech's negligence directly cause Ms. Todd to suffer injury?

**ANSWER:** Yes____ No_____

**INTENTIONAL TORTS**

**QUESTION NO. 8:** Should Ortho Biotech have reasonably foreseen Mr. Moreland's (a) assault; (b) battery; (c) false imprisonment; and/or (d) intentional infliction of emotional distress upon Ms. Todd, from the nature of Mr. Moreland's employment and the duties relating to it?

ANSWER: (a) Assault - Yes___ No_X__

(b) Battery - Yes___ No_X__

(c) False Imprisonment - Yes___ No_X_

(d) Intentional Infliction of Emotional Distress - Yes___ No__X__

If your answer to Question No. 8 (a), (b), (c), and/or (d) is "Yes", go to Question No. 9. If your answer to all parts of Question No. 8 is "No", skip to Question No. 10.

**QUESTION NO. 9:** Did Mr. Moreland's assault, battery, false imprisonment and/or intentional of emotional distress upon Ms. Todd occur at place and during a time related to Mr. Moreland's employment with Ortho Biotech?

**ANSWER:** Yes____ No_____

**SEXUAL HARASSMENT**

**QUESTION NO. 10:** Was Ms. Todd subjected to a hostile working environment?

**ANSWER:** Yes_X__ No_____

If your answer to Question No. 10 is "Yes", go to Question No. 11. If your answer to Question No. 10 is "No", skip Question No. 13.

**QUESTION NO. 11:** Did Ortho Biotech know or should it have known of the harassment?

**ANSWER:** Yes_X__ No_____

If your answer to Question No. 11 is "Yes", go to Question No. 12. If your answer to Question No. 11 is "No", skip to Question No. 13.

**QUESTION NO. 12:** Did Ortho Biotech fail to take proper and effective remedial action?

**ANSWER:** Yes____ No_X__

**QUESTION NO. 13:** Did Mr. Moreland use his actual or apparent authority at Ortho Biotech to further his harassment of Ms. Todd, or was he otherwise aided in accomplishing his harassment by virtue of the position he had with Ortho Biotech?

**ANSWER:** Yes_X__ No____

**QUESTION NO. 14:** Answer this question no matter how you have answered the previous questions.

(a) What sum of money will fairly and adequately compensate Lori Todd for damages up to the date of this verdict for:

Loss of earnings? $100,000^{00}$

Medical expenses? ___0____

Pain, emotional distress and loss of enjoyment of life? $90,000^{00}$

(b) What sum of money will fairly and adequately compensate Lori Todd for such future damages as are reasonably certain to occur for:

Loss of earnings (earning capacity)? $28,000^{00}$

(1) over what period of time will such loss of earnings, if any, occur?

1/2 years.

Medical expenses? 0

(1) over what period of time will such medical expenses, if any, occur?

0 years.

Pain, emotional distress and loss of enjoyment of life? 0

(1) over what period of time will such intangible pain, emotional distress and loss of enjoyment of life, if any, occur? 0 years.

**RETALIATION**

**QUESTION NO. 15**: Did Ortho Biotech take adverse employment action against Ms. Todd in retaliation for her engaging in protected conduct?

**ANSWER:** Yes____ No X

If your answer to Question No. 15 is "Yes", you must answer Question No. 16. If your answer to Question No. 15 is "No", do not answer Question 16.

**QUESTION NO. 16:** What sum of money will fairly and adequately compensate Ms. Todd for damages suffered by her as a result of any retaliation by Ortho Biotech?

ANSWER: $_____

**DO NOT** Answer Question No. 17 unless you have answered either Question No. 14 or Question No. 16. If you were not required to answer Question 14 or Question 16, simply stop here, sign and date this verdict on the last page and return it to the courtroom.

**QUESTION NO. 17:** Did Ms. Todd fail to mitigate her damages?

**ANSWER:** Yes____ No_X__

If your answer to Question No. 17 is "Yes", you must answer Question No. 18. If your answer to Question No. 17 is "No", simply stop here, sign and date this verdict on the last page and return it to the courtroom.

**QUESTION NO. 18:** What is the total amount of money, if any, that Ms. Todd would have earned if she had reasonable mitigated her damages?

$_____

Dated: 6-23-1995 AT ST. PAUL, MINNESOTA

*/s/ Signature illegible*
Jury Foreperson

# CHAPTER 363

# DEPARTMENT OF HUMAN RIGHTS

## 363.01 DEFINITIONS.

Subdivision 1. **Terms.** For the purposes of this chapter, the words defined in this section have the meanings ascribed to them.

* * *

Subd. 14. **Discriminate.** The term "discriminate" includes segregate or separate and, for purposes of discrimination based on sex, it includes sexual harassment.

* * *

Subd. 41. **Sexual harassment.** "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:

(1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing:

(2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public accommodations or public services, education, or housing; or

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services,

education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

**363.03 UNFAIR DISCRIMINATORY PRACTICES.**

Subdivision 1. **Employment.** Except when based on a bona fide occupational qualification, it is an unfair employment practice:

* * *

(2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

**§ 2000e. Definitions**
For the purpose of this title [42 USCS §§ 2000e et seq.]–

* * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian Tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code [5 USCS § 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [Internal Revenue Code of 1986] except that during the first year of the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

**§ 2000e-2. Unlawful employment practices**
**(a) Employer practices.** It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive

or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

**Instruction No. 37**

Ms. Todd has sued her employer, defendant Ortho Biotech, for sexual harassment committed by Mr. Moreland. She contends that Ortho Biotech is liable for Mr. Moreland's sexual harassment because he was a supervisor at the time of the attack.

An employer is liable for the sexual harassment committed by its supervisor if the supervisor used his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of his supervisory powers. In such a case, the employer cannot escape liability by taking some after the fact remedial action.

Actual authority means such authority as an employer intentionally confers upon a manager, or such authority that an employer, either intentionally or by want of ordinary care, allows a manager to believe that he or she possesses.

Apparent authority means such authority as an employer knowingly permits a manager to assume, or which it hold the manager out as possessing; such authority as the manager appears to have by reason of his or her actual authority; or such authority as a reasonably prudent person, using diligence and discretion, would naturally suppose the manager to possess.

**Instruction No. 40**

If you find that Mr. Moreland was not a supervisor of Ortho Biotech, then Ortho Biotech is liable for the sexual harassment committed by Mr. Moreland if Ms. Todd establishes that:

1) Ortho Biotech knew or should have known of the sexual harassment; and,

2) Ortho Bio Tech failed to take prompt and effective remedial action to stop the harassment.

**Instruction No. 41**

If you find that Mr. Moreland was a co-worker, prompt and effective remedial action consists of efforts which the company made once on notice of Mr. Moreland's attack on plaintiff which were calculated to end the harassment. If you find that Ortho Biotech took prompt and effective remedial measures in response to plaintiff's allegations against Mr. Moreland, then you must find for Ortho Biotech and against her claims for sexual harassment.

**Innovation in Health Care**

In 1973, scientists fused together the genes of two separate organisms and, for the first time, created a third, previously non-existent life-form. Since then, the field of biotechnology has developed technological breakthroughs never before imagined.

In the not-too-distant future, biotechnology may cure once incurable diseases, overcome birth defects and perhaps, solve the riddle of life itself. Already genetic engineering has saved countless lives and dramatically improved the quality of life for patients worldwide. Everyday, new technological advances bring more genetically engineered products and processes closer to realization.

For sales and marketing professionals in biotechnology – who are helping to bring newly discovered products and processes into hospitals and healthcare facilities worldwide – there can be no greater satisfaction than knowing that their efforts make a difference in someone's life.

Ortho Biotech has developed treatments which significantly impact patient care. We discovered the first monoclonal antibody therapy, ORTHOCLONE OKT®3. for the reversal of acute kidney transplant rejection. Human recombinant crythropoictin, tradenamed PROCRIT® in the United States and EPREX® internationally, is an important treatment for anemia associated with several chronic illnesses. And, we continue exploring other promising therapies for many serious illnesses.

Making differences in patient care is the special promise of biotechnology. And the promise of Ortho Biotech is to make a difference through technological innovation, organizational and employee growth, and market leadership.

***James Moreland***
*National Sales Manager, Hematopoietic Products*

*Joined McNeil Labs, a Johnson & Johnson subsidiary, in 1974 as a sales representative. Advanced through the management training program into product management. Served as a sales manager in California, was promoted to product director, and then Northeast regional manager. Joined Ortho Biotech in November, 1988.*

*"I was attracted to biotechnology for the same reasons that many others are. It's new, it's exciting, it's challenging, and it's on the leading edge of medicine. You can't ask for more than that if you're looking for career opportunity in health care.*

*Due to the highly scientific nature of this business, we need people who can provide the medical community with indepth expertise on breakthrough technologies. We need people who are the best and want to work with the best. We need people who can absorb highly technical data and feel comfortable in communicating with physicians at the top of their field.*

*It may not be an easy job, but you'll never find one that's more satisfying or a company that's more stimulating. This is not a job for the shy and retiring. It's for people who demand to grow."*

NOTIFICATION OF RELOCATION

TO: JOHNSON & JOHNSON RELOCATION DEPT.
NEW BRUNSWICK, NJ
FAX # (908) 524-2187 TELEPHONE #'S JOANNE SUE 2304 & 2305 LIBBY JILL 2306 & 2307 WILLIE BEE 2308 & 23

This is to advise you that the following individual will be relocating and eligible for the benefits indicated below.

NAME: Lori Todd
HOME ADDRESS: 6321 Harriet Road
Eden Prairie MN
55344

S.S.# 475-68-7070
PHONE # (612) 820 - 6157 (Hom
( ) - (Wor

NEW JOB LOCATION: Rochester MN

(PLEASE CHECK ONE)
___ Transferee
X New Hire (sales force)
___ New Hire (In-house)*
___ Employee Requested Move
___ Int'l. Move

NEW JOB TITLE: Product Specialist
START DATE: 3-30-92
COMPANY NAME: Ortho-Biotech
ACCOUNT #:

PLEASE CHECK ONLY THOSE ITEMS TO WHICH TRANSFEREE IS ENTITLED:

/ FULL RELOCATION PACKAGE (If checked, there is no need to check other boxes)
___ Movement of Household Goods
___ Storage for ____ months (3 normal)
___ Incidental Expenses _____ $1,500.00 (Homeowners)
_____ 750.00 (Renter)
___ Homefinding Assistance and Counseling
___ Househunting _____ # of trips (2 normal)
___ Temporary Living Benefits
___ Home Pre-Marketing Assistance Program
___ Third-Party Homesale Program (Guaranteed Buy-Out)
___ Loss on Sale of Home Policy
___ Bridge Loan
___ Mortgage Assistance Program
___ New Home Closing Costs - _____ Total Closing Costs
_____ Partial Closing Costs of $_____
___ Travel From Old to New Location (Final Trip)
___ Lease Cancellation
___ Spouse Assistance
___ School Match Program
___ Relocation Differential Allowance
___ Gross-Up of Relocation Expenses
___ Car Allowance (ONCE IN A LIFETIME) When transferee loses use of Co. Car
___ Other (Please be specific) _____

*PLEASE ATTACH COPY OF OFFER LETTER

APPROVED BY: [signature] PAUL A. MOFFLAND 4-1-92
Signature Print Name Date Signed Pursuant to Protective Order

NATIONAL SALES MANAGER 908-704-5012
Title Telephone Number

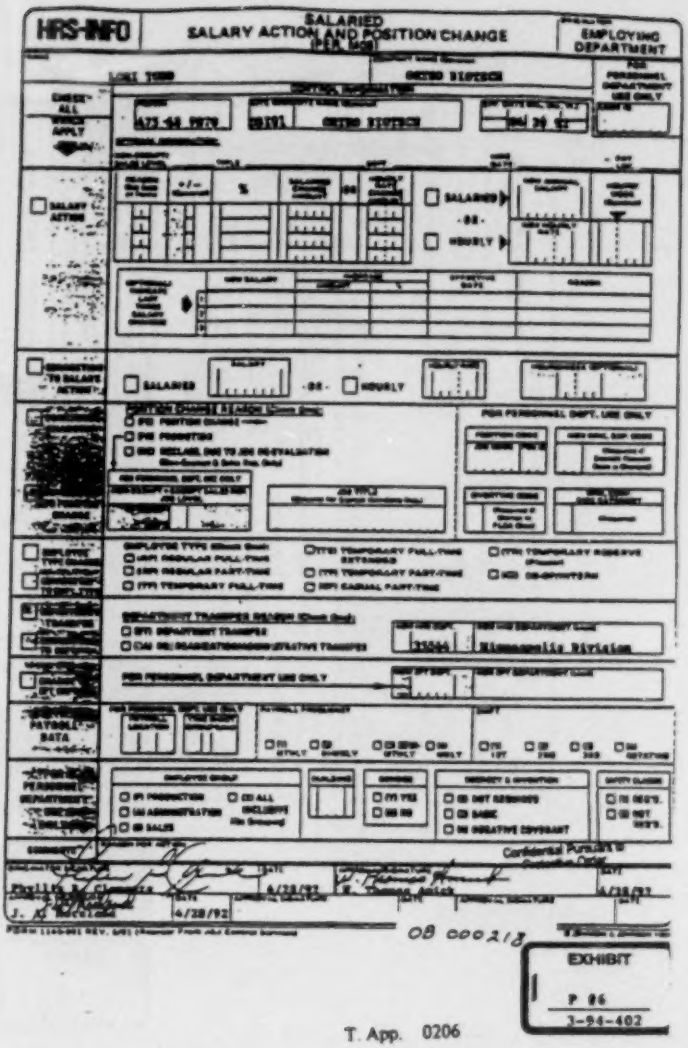
08 000217

EXHIBIT
P 85
3-94-402

T. App. 0205



BEST AVAILA


HRS-INFO

SALARIED
SALARY ACTION AND POSITION CHANGE
(PER MGR)

EMPLOYING DEPARTMENT

OB 000218

EXHIBIT
P 86
3-24-402

T. App. 0206



ABLE COPY

T. App. 0207

**HEMATOPOIETIC PROCRIT® SALES DIVISION**

**JAMES A. MORELAND**
NATIONAL SALES MANAGER
Route 202 South, Box 300
Raritan, NJ 08869
(908) 704-5050
(908) 704-5175 (FAX)

Phyllis S. Clements, Secretary to Mr. Moreland
(908) 704-5054

**W. THOMAS AMICK**
FIELD SALES MANAGER
Route 202 South, Box 300
Raritan, NJ 08869
(908) 704-5059
(908) 704-5176 (FAX)
VNI 03100

Brenda James, Secretary to Mr. Amick
(908) 704-5367

**EASTERN REGIONAL MANAGER**
JOANNE V. NASO
VNI 03054
DEPARTMENT 49059
Regional Code #27

**EASTERN REGIONAL OFFICE**
**ARLENE FITCH**
Regional Office Coordinator
VNI #3791
421 Courtyard Drive
Somerville, NJ 08876
(908) 253-4300
(908) 253-4390 (FAX)

**CENTRAL REGIONAL MANAGER**
MARY F. McGOVERN
VNI 03021
DEPARTMENT 49054
Regional Code #28

**CENTRAL REGIONAL OFFICE**
[redacted]

**SOUTHERN REGIONAL MANAGER**
WILLIAM C. PEARSON, III
VNI #3489
DEPARTMENT 49049
Regional Code #35

**SOUTHERN REGIONAL OFFICE**
**LINDA A. MATT**
Regional Office Coordinator
VNI #3973

**SANDIE A. DAVIS**
Regional Office Secretary
VNI #3931

2 Kingwood Place
700 Rockmead Drive
Suite 248
Kingwood, TX 77339
(713) 358-7424
(713) 358-7394 (FAX)

**WESTERN REGIONAL MANAGER**
DAVID M. HILL
VNI 03030
DEPARTMENT 49043
Regional Code #38

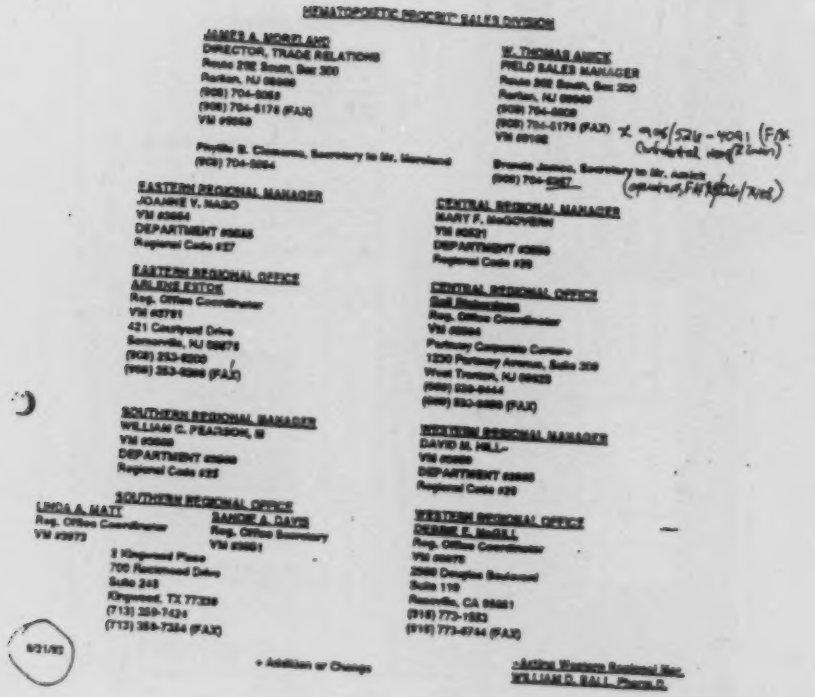
**WESTERN REGIONAL OFFICE**
**DEBBIE E. McGILL**
Regional Office Coordinator
VNI 03078
2999 Douglas Boulevard
Suite 110
Roseville, CA 95661
(916) 773-1553
(916) 773-9744 (FAX)

5/10/93

+ Additions or Changes

+ Ashley Woodcock Regional Mgr.
WILLIAM D. BALL, Pharm.D.

EXHIBIT
P 011
3-94-402



HEMATOPOIETIC PROCEPT® SALES DIVISION

JAMES A. MORZ1 AHO
DIRECTOR, TRADE RELATIONS
Route 202 South, Ste 300
Raritan, NJ 08869
(908) 704-5069
(908) 704-5178 (FAX)
VM #9069

Phyllis B. Clemente, Secretary to Mr. Moreland
(908) 704-5064

W. THOMAS AMICK
FIELD SALES MANAGER
Route 202 South, Ste 300
Raritan, NJ 08869
(908) 704-5059
(908) 704-5178 (FAX)
VM #9106

Brenda Jones, Secretary to Mr. Amick
(908) 704-5067

EASTERN REGIONAL MANAGER
JOANNE V. NAGO
VM #9064
DEPARTMENT #5845
Regional Code #27

EASTERN REGIONAL OFFICE
ARLENE EXTOK
Reg. Office Coordinator
VM #9781
421 Courtyard Drive
Somerville, NJ 08876
(908) 253-9200
(908) 253-9266 (FAX)

CENTRAL REGIONAL MANAGER
MARY F. McGOVERN
VM #9021
DEPARTMENT #5869
Regional Code #29

CENTRAL REGIONAL OFFICE
Gail Rabenstein
Reg. Office Coordinator
VM #9266
Parkway Corporate Center
1250 Parkway Avenue, Suite 309
West Trenton, NJ 08628
(609) 530-9444
(609) 530-9886 (FAX)

SOUTHERN REGIONAL MANAGER
WILLIAM C. PEARSON, III
VM #9069
DEPARTMENT #5868
Regional Code #25

SOUTHERN REGIONAL OFFICE
LINDA A. MATT
Reg. Office Coordinator
VM #3973

SANDIE A. DAVIS
Reg. Office Secretary
VM #9681

3 Kingwood Place
700 Rockwood Drive
Suite 248
Kingwood, TX 77339
(713) 359-7424
(713) 359-7344 (FAX)

WESTERN REGIONAL OFFICE
DEBBIE F. McGILL
Reg. Office Coordinator
VM #9975
2560 Douglas Boulevard
Suite 110
Roseville, CA 95661
(916) 772-1553
(916) 773-6744 (FAX)

9/21/93

+ Addition or Change

+Active Western Regional Mgr.
WILLIAM D. BALL, Pharm.D.

LT 181116

T. App. 0218



BEST AVAILABLE COPY

**ORTHO BIOTECH**

Date: November 3, 1992

To: Hematopoietic Product Specialists
Immunobiology Product Specialists
National Accounts Managers
Regional Managers
Division Managers

From: John Pear

cc: R. W. Zahn
W. T. Amick
M. C. Gardner
Biotech Help Center

Subject: **Personnel Practices Manual/**
**4th Quarter Sales Supply Form Diskette**

Please find enclosed the following:

- Diskette containing the Personnel Practices Manual and the 4th Quarter Sales Supply form to be copied onto your computer.
- Installation Instructions for the diskette.
- Personnel Practices Manual "How To Use" instructions.
- Ortho Biotech Personnel Practices Manual Disclaimer.

All questions related to diskette installation should be directed to the Biotech Help Center (1-800-348-5940). All questions related to accessing the Personnel Practices Manual should be directed to Noelle Sue Chalfant at (908) 704-5158.

JP:pbc
Enclosures
pear11-3

## ORTHO BIOTECH PERSONNEL PRACTICES MANUAL DISCLAIMER

a. This manual contains an overview of the personnel policies, procedures and employee benefits of Ortho Biotech. The contents of this manual are informational only and are intended solely as a guide. The language used in this manual does not, nor is it intended to constitute or create, nor is it to be construed to constitute or create, the terms of an employment contract between the Company and any of its employees.

b. It is the policy of Ortho Biotech not to enter into employment contracts unless they are in writing and approved by the Vice-President of Human Resources. Accordingly, an employee's employment and compensation can be terminated with or without cause and with or without notice at any time, at the option of either the employee or the Company. No employee or representative of the Company, other than the Vice-President of Human Resources, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.

c. Although Ortho Biotech believes in and endorses the contents hereof, they are not conditions of employment. Employees of the Company have the right to terminate their employment at anytime. The Company has the right to terminate the employment of any employee at anytime, with or without cause, regardless of any other documents

or oral or written statements issued by the Company or its representatives.

d. In order to provide effective administration and supervision of personnel, it is necessary to modify policies and procedures as needed; therefore, the Company makes no promises about the duration of the contents of this manual and reserves the right to change the policies, rules and procedures contained herein at anytime in whole or in part, with or without prior notice.

e. Any questions and concerns about the contents herein or suggestions for improving those contents should be directed to the Human Resources Department.

Open communication is essential to the development of a culture that demonstrates value and respect for all employees. In the past, the OBI Policy and Practices Manual was distributed only to employees who were responsible for supervising other employees. The perception that generated from this practice, as reported in our ACE program, was that there was information that was either "hidden" or "privileged."

Our intent was to have a wide enough distribution of the manual to allow all employees access through their supervisors. This created a special difficulty in the field as the Division Managers and Regional Managers often times were geographically separated. It became obvious that, in order to maximize communication of the policies and deal with the negative perceptions, we would need to change the method of distribution of the manual.

Therefore, attached to this memo you will find the OBI Personnel Practices Manual for your use. It is important to

note that the practice of placing the manual in the "hands" of all field employees is new to our company. However, we feel that it will allow access to and use of an important resource. It will provide a forum to discuss any related issues with your management or Human Resources.

Please read carefully the disclaimer in the first section of the manual as it describes the intent of the manual and its non-contractual status. For further information on the contents or the intent of any policy or practice, please contact your management or Craig Mangean in Human Resources.

August 24, 1992

**JAMES A. MORELAND**

We are pleased to announce the appointment of JAMES A. MORELAND to the new position of Director of Trade Relations effective September 1.

As the Ortho Biotech business has matured, Trade Relations has become a complex area in which we have been focusing on customer needs nationally. We need to continue to develop programs that will provide a competitive advantage through channels of distribution.

James joined Johnson & Johnson in 1974 as a Representative with McNeil Pharmaceutical. During James' 14 years with McNeil, he held several positions of increasing responsibility including District Sales Manager, Product Director and Regional Manager. In 1988, James joined Ortho Biotech as National Sales Manager and was a pioneer in establishing the Ortho Biotech PROCRIT® (Epoetin alfa) Product Specialists organization. James' 18 years of experience at all levels of the pharmaceutical business provide him with the unique skills to understand our customer needs on a national basis, develop programs to provide a PROCRIT advantage with all of our classes of trade and to establish trade policy and represent Ortho Biotech at the national level. The Ortho Biotech business is a dynamic ever-changing business. With James to provide focus an channels of distribution, we will develop a greater customer orientation resulting in marketshare and sales forecast achievement.

Please join me in wishing James well in his new responsibilities. James will continue to report to me. W.

Tom Amick will continue in his position as Field Sales Manager and will report to me.

Richard W. Zahn

Removal Date: September 10, 1992

Supreme Court, U.S.
FILED
AUG 21 1998
OFFICE OF THE CLERK

No. 98-155

In the
# Supreme Court of the United States
October Term, 1998

Lori A. Todd,
*Petitioner,*

vs.

Ortho Biotech, Inc.,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## BRIEF IN OPPOSITION

David F. Herr
*Counsel of Record*
Howard B. Tarkow
Susan E. Oliphant
Cynthia F. Gilbertson
Michael C. McCarthy
MASLON EDELMAN BORMAN & BRAND, LLP
3300 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 672-8200

*Counsel for Respondent*

1998 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

## QUESTION PRESENTED

Is an employer vicariously liable under Title VII of the Civil Rights Act of 1964 for a one-time incident of sexual harassment committed by a high-level employee who had no supervisory authority over the plaintiff, when the employer (a) could not have foreseen the offensive conduct, (b) had a sexual harassment policy in place, and (c) upon promptly learning of the incident, took proper and effective remedial action?

## RULE 29.6 STATEMENT

Ortho Biotech, Inc., is a wholly owned subsidiary of Johnson & Johnson.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i
RULE 29.6 STATEMENT ..... ii
TABLE OF CONTENTS ..... iii
TABLE OF AUTHORITIES ..... iii
STATEMENT OF THE CASE ..... 1
*Ortho's Sexual Harassment Policy* ..... 2
*Moreland Was Not Todd's Supervisor* ..... 3
*Ortho's Proper and Effective Remedial Action* ..... 5
*The Litigation* ..... 5
REASONS FOR DENYING THE PETITION ..... 8
Faragher *and* Burlington *Involved Supervisors in the Plaintiffs' "Chain of Command"* ..... 8
Faragher *and* Burlington *Involved Long-Running Incidents of Sexual Harassment* ..... 10
*The Court of Appeals Has Already Conducted the Proper Analysis* ..... 14
CONCLUSION ..... 15

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Burlington Industries, Inc. v. Ellerth*,
524 U.S. ___ (1998) ..... *passim*

*Faragher v. City of Boca Raton*,
524 U.S. ___ (1998) ..... *passim*

*Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *cert. granted, vacated, and remanded*, 118 S. Ct. 2364 (1998) ..... 13

*Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) ..... 11

*Reynolds v. CSX Transportation, Inc.*, 115 F.3d 860 (11th Cir. 1997), *cert. granted, vacated, and remanded*, 118 S. Ct. 2364 (1998) ..... 13

*Todd v. Ortho Biotech, Inc.*, 138 F.3d 733 (8th Cir. 1998) ..... *passim*

**STATUTES AND RULES**

Minnesota Human Rights Act, MINN. STAT. ch. 363 ..... 2

SUP. CT. R. 10(c) ..... 8

**MISCELLANEOUS**

Analysis: Supreme Court Increases Liability of Employers for Sexual Harassment But Creates Affirmative Defense, 158 Lab. Rel. Rep. (BNA) 296, 301 (July 6, 1998) ..... 12

Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991) ..... 9

Ortho Biotech, Inc. ("Ortho") respectfully asks that the Court deny the petition filed by Lori Todd ("Todd" or "Petitioner") for a writ of certiorari. No aspect of this case warrants review by this Court. In apparent recognition of this fact, Petitioner asks that, rather than address the merits of her claim, the Court vacate the judgment of the Court of Appeals and remand this case for further review by that court in light of this Court's recent decisions in *Faragher v. City of Boca Raton*, 524 U.S. ___ (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. ___ (1998). The Court should decline Petitioner's invitation to subject both the Court of Appeals and the parties to further proceedings. Contrary to Petitioner's fervent, albeit understandable, desire, neither *Faragher* nor *Burlington* involved (or purport to apply to) a single unforeseen incident of sexual harassment committed by an individual who did not have "immediate (or successively higher) authority over the employee," *Faragher*, slip op. at 29-30, and, accordingly, no purpose would be served by granting Petitioner's request.

## STATEMENT OF THE CASE

This suit results from the attempted rape of Petitioner by James Moreland, who was at the time a high-level Ortho employee. In seeking a writ of certiorari, Petitioner continues her efforts to hold Ortho vicariously liable for Moreland's actions despite jury findings that Ortho could not have foreseen that Moreland would commit such an act, *see* Pet. App. A-57 to A-58,[1] and that, upon learning of the incident, Ortho took prompt, proper, and effective remedial action, Pet. App. A-61,

---

[1] The following abbreviations will be used throughout this Brief: "Pet." to refer to the Petition for a Writ of Certiorari, "Pet. App." to refer to the Appendix thereto, "T." to refer to the transcript of the trial in this matter, and "Def. Ex." to refer to a Defendant's Exhibit.

which included terminating Moreland. *See* Pet. App. A-9, A-17. The relevant facts were carefully summarized by the Court of Appeals in its opinion and need not be restated here. *See Todd v. Ortho Biotech, Inc.*, 138 F.3d 733, 735-36 (8th Cir. 1998) (Pet. App. A-1 to A-18).[2] Certain facts do bear on the question posed by Petitioner, however, and they merit brief attention.

***Ortho's Sexual Harassment Policy***

In light of this Court's decisions in *Faragher* and *Burlington*, Petitioner suggests that Ortho lacked an appropriate policy regarding sexual harassment at the time of Moreland's attack. *See* Pet. 18-20. This issue was not the focus of the trial, and no question submitted to the jury directly addressed it. *See* Pet. App. A-57 to A-63 (special verdict form). It was litigated in the context of the state-law claim, however, and the Court of Appeals expressly noted in that context that "Ortho had a published policy against sexual harassment." Pet. App. A-15.

The record amply supports the conclusion that Ortho's sexual harassment policy was entirely satisfactory — even when viewed retrospectively through the prism of *Faragher* and *Burlington*. Ortho has maintained a policy prohibiting sexual harassment since its inception in 1986. T. 640-41. Ortho initially operated under the sexual harassment policy of its corporate predecessor, and in August 1991 published its own

---

[2] Petitioner seeks review only of her Title VII claim and has expressly abandoned her claim under the Minnesota Human Rights Act, MINN. STAT. ch. 363. *See* Pet. 3. Accordingly, the Court of Appeals has had the last word on that matter, and the District Court opinion that was addressed solely to that claim, *see* Pet. App. A-34 to A-50, is of no consequence to the issue presented by Petitioner.

Personnel Policies and Practices Manual for use by Ortho managers. *Ibid.*

On July 17, 1992 — two months prior to Moreland's assault — Ortho's president sent a memo to all employees in which, among other things, he reinforced Ortho's commitment to providing a work environment free of harassment. Def. Ex. 1; *see* T. 639. Later that month, Craig Mangean, Ortho's director of employee relations and development, reinforced this message in a memorandum to all field employees. Def. Ex. 7. Mangean asked that employees direct complaints of sexual harassment to him, and promised to investigate all complaints immediately. *Ibid.* When, two days after the attack, Petitioner reported the incident to Ortho's director of management development, he immediately involved Mangean, *see* Pet. App. A-8, which set in motion the remedial action found by the jury to be "proper and effective," Pet. App. A-61 — a finding the Court of Appeals concluded was "well supported by the trial evidence." Pet. App. A-13; *see also infra* at 5.

### *Moreland Was Not Todd's Supervisor*

Petitioner's attempt to fit this case within the holdings of *Faragher* and *Burlington* also involves a recasting of the facts regarding her employment relationship with Moreland. *See* Pet. 10-12. Specifically, Petitioner contends that vicarious liability is warranted because Moreland was "a 'supervisor,'" Pet. 10, and, in a wholly new twist, that she falsely but reasonably understood that he was her supervisor. Pet. 17.

In the District Court, Petitioner's Title VII claim rested on the contention that Moreland was "a supervisor," as opposed to being Todd's supervisor. *See* Pet. App. A-68 (jury is instructed that plaintiff "contends that Ortho Biotech is liable for Mr.

Moreland's sexual harassment because he was a supervisor at the time of the attack"); *see also infra* at 6-7 & n.3. As the Court of Appeals noted, the District Court, as prompted by Todd, "only required the jury to find that Moreland was an Ortho supervisor, not that he was Todd's supervisor." Pet. App. A-12. Ortho does not dispute that Moreland was a high-level employee, but, again in the words of the Court of Appeals, "[t]he fact is that Moreland was not in Todd's 'chain of command' when he assaulted her . . . ." *Ibid.*

At the time that Todd began her entry-level employment with Ortho, Moreland was in Todd's "chain of command," near the top of Ortho's six-tier sales organizatio[illegible]. *See* T. 189-90. By the time Todd met Moreland, Ortho had moved him out of this corporate hierarchy. By August 1992, one month prior to Todd's encounter with Moreland, Ortho's vice president of sales and marketing had become dissatisfied with Moreland's performance and demoted him to a position in which he had no supervisory authority over any of the employees in the sales organization. *See* T. 909-10, 912, 914-15, 1082-84; *see also* Def. Ex. 54. Before Todd met Moreland in September 1992, she understood that he was no longer Ortho's national sales manager and that he had been given different responsibilities. *See* T. 189, 191-92.

In effect, Todd seeks this Court's assistance in a *post hoc* revision of her trial strategy. The claim submitted to the jury turned solely on Moreland's role as "a supervisor" — not Todd's supervisor or her newfound mistaken understanding that Moreland was her supervisor. Todd and her counsel sought to have their claim submitted in this fashion (*see infra* n.3) — over Ortho's express objection, *see* T. 1297 — and this Court should not provide a forum in which parties disappointed with the outcome of their trial strategy may turn back the clock.

### *Ortho's Proper and Effective Remedial Action*

The jury found that Ortho's response to Todd's report of Moreland's actions constituted "proper and effective remedial action." Pet. App. A-61. The Court of Appeals' review of the facts that support that finding is instructive. After hearing Todd's complaint regarding the incident, which had occurred at the Boston hotel at which Ortho was conducting a sales meeting, Ortho's representatives

> expressed shock and sympathy, asked Todd what she would like them to do, offered to move her to another hotel room, and helped her return home. In Minnesota, Ortho offered to pay Todd's uninsured therapy costs (which she declined); urged her to move her therapy day to a work day, with full pay; and granted her substantial paid leave. Ortho's senior management confronted Moreland when he returned from the sales conference, investigated Todd's complaint thoroughly, and fired Moreland when Todd's complaint was found to be credible. . . . By terminating this high-ranking minority employee with two decades of experience and no complaints on his record on the ground that he sexually harassed a relatively new employee, Ortho showed its commitment to preventing sexual harassment in its workplace, not timidity in the face of controversy.

Pet. App. A-16 to A-17.

### *The Litigation*

Petitioner's Title VII claim was tried to a jury, which returned a special verdict that exonerated Ortho for its actions before, during, and after Moreland's attack on Todd and found

for Ortho on seven of the eight claims it was charged to consider. After considering the evidence at trial, the jury made the following findings of fact, none of which has been challenged by Todd:

- Ortho did not know nor should it have known that Moreland had a propensity for misconduct;
- Ortho acted reasonably under the circumstances to control Moreland;
- Ortho could not be expected to foresee Moreland's conduct based on the nature of his employment and related duties;
- Ortho took proper and effective remedial action after learning about the assault; and
- Ortho did not retaliate against Todd for complaining about the assault.

Pet. App. A-57 to A.62.

Despite the consistent findings in Ortho's favor, the District Court held Ortho liable for sexual harassment under Title VII because of the jury's affirmative answer to Question No. 13, which reads as follows:

> Did Mr. Moreland use his actual or apparent authority at Ortho Biotech to further his harassment of Ms. Todd, or was he otherwise aided in accomplishing his harassment by virtue of the position he had with Ortho Biotech?

Pet. App. A-61. Jury Instruction No. 37 — on which Question No. 13 was based and which was, in relevant part, requested by

Petitioner[3] — required the jury to impose strict vicarious liability so long as Moreland was found to have been "aided in accomplishing the harassment by the existence of his supervisory powers." Pet. App. A-68. Put most simply, this instruction and special verdict form required the jury to impose strict vicarious liability on Ortho simply because Moreland was a management-level employee at the time of the attack. *See* Pet. App. A-12.

The jury awarded Todd damages totaling $218,000 for lost past and future earnings and emotional distress, Pet. App. A-61 to A-62, and the District Court awarded attorneys' fees and costs totaling $207,572.24. Pet. App. A-33.

The Court of Appeals rejected the District Court's instruction to the jury regarding strict vicarious liability and reversed the Title VII judgment based on the jury's finding that "Ortho took timely and appropriate action to remedy another employee's attempted rape of Todd," and the court's legal conclusion that "such action is a complete defense to [Todd's] claims under Title VII . . . ." Pet. App. A-7.

---

[3] This aspect of Instruction No. 37 was taken verbatim from the instruction proposed by Petitioner entitled "Employer Liability for Sexual Harassment of a Supervisor." *See* Plaintiff's Proposed Jury Instructions, at 35. Plaintiff's proposed instruction makes no mention of the necessity of finding either that Moreland was Petitioner's supervisor or that Petitioner believed him to be in her "chain of command." *See ibid.* Indeed, in another proposed sentence that was incorporated into Instruction No. 37, Petitioner described her claim in these words: "Ortho Biotech is liable for Mr. Moreland's sexual harassment *because he was a supervisor* at the time of the attack." *Ibid.* (emphasis added); *see* Pet. App. A-68.

## REASONS FOR DENYING THE PETITION

Petitioner makes almost no effort to satisfy the requirements of Rule 10: she argues neither that the Court of Appeals' decision is in conflict with the decisions of other lower courts nor that this case presents an "important federal question." SUP. CT. R. 10(c). Rather, she relies exclusively on what she perceives to be the impact of this Court's recent decisions in *Faragher* and *Burlington* on the ruling by the Court of Appeals that Ortho was not vicariously liable for Moreland's acts of harassment because it was not negligent either in attempting to prevent or in acting to remedy Moreland's conduct. Because the holdings of *Faragher* and *Burlington* do not purport to apply to a one-time incident of harassment committed by a person outside the victim's "chain of command" — and because the reasoning employed in support of those holdings does not support any different result than was reached by the Court of Appeals in this case — the Petition should be denied.

### Faragher *and* Burlington *Each Involved Supervisors in the Plaintiff's "Chain of Command"*

In *Burlington*, the Court considered whether a plaintiff could recover under Title VII when she had experienced threats of a tangible, adverse employment action, but no such action was taken. *See Burlington*, slip op. at 8. The threats in that case had been made by the person to whom her immediate supervisor reported. *See id.* at 2. The Court concluded that strict vicarious liability attaches when a supervisor commits sexual harassment resulting in a tangible employment action because such "actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 17. When tangible employment actions are threatened but not taken, the Court held, vicarious liability

attaches subject to a two-part affirmative defense, *see infra* at 10, so long as the actionable conduct is committed "by a supervisor with immediate (or successively higher) authority over the employee." *Id.* at 20.

*Faragher* involved actionable sexual harassment committed by the plaintiff's immediate supervisors. *Faragher*, slip op. at 1-2. The court concluded that, as in *Burlington*, vicarious liability, subject to an affirmative defense, was appropriate for sexual harassment committed "by a supervisor with immediate (or successively higher) authority over the employee." *Id.* at 29-30. In the course of reaching that conclusion, however, the Court noted that employer liability under Title VII for co-worker harassment has been uniformly judged by "a negligence standard," *id.* at 21, and that the rationale for imposing a stricter liability standard in the case of supervisors stemmed from the nature of the "'power to supervise — [which may be] to hire and fire, and to set work schedules and pay rates . . . .'" *Id.* at 26 (quoting Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 854 (1991); alteration in *Faragher*).

Neither *Faragher* nor *Burlington* purports to apply to the facts of this case — one-time harassment committed by a high-level employee who lacks "immediate (or successively higher) authority over" the victim. Nonetheless, the reasoning used by the Court to support liability "for some tortious conduct of a supervisor made possible by abuse of his supervisory authority," *id.* at 24, supports a clear distinction between supervisors who possess authority over the victim and those who, because they lack such power to hire and fire, more closely resemble co-workers. *Faragher* and *Burlington* support employer liability for harassment by a supervisor-level employee who is not in the victim's "chain of command" — who lacks the authority to cause a tangible employment action

— only if the employer is negligent (just as in the case of co-worker harassment), which is precisely the standard applied by the Court of Appeals in this case.

### Faragher *and* Burlington *Involved Long-Running Incidents of Sexual Harassment*

In *Burlington*, the harassment involved repeated incidents that occurred over the course of nearly one year. *See Burlington*, slip op. at 2-3. Similarly, in *Faragher*, the harassment occurred over a five-year period. *See Faragher*, slip op. at 1. In this case, the harassment consisted of a one-time incident.

Petitioner suggests that because Moreland was "a supervisor," *Faragher* and *Burlington* require that vicarious liability attach to Ortho, subject to the affirmative defense announced in those cases. Application of that defense to a one-time case of harassment such as this would, quite simply, be nonsensical, and would verge on "automatic" liability — the very result that *Faragher* sought to avoid. *See Faragher*, slip op. at 26.

The affirmative defense announced in *Faragher* and *Burlington*

> comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

*Burlington*, slip op. at 20; *Faragher*, slip op. at 30. The first part of the defense focuses on whether the employer "exercised reasonable care," *Faragher*, slip op. at 28 — *i.e.*, was the employer negligent? The second focuses on whether the victim "act[ed] with like reasonable care." *Id.*

Ortho does not dispute the propriety of a negligence-based standard for determining employer liability in a case such as this. But *Faragher* and *Burlington*'s additional focus on the possible negligence of the victim — which arose in the context of long-running incidents of sexual harassment — makes no sense when applied to a one-time incident of sexual harassment.

In adopting the affirmative defense announced in *Faragher* and *Burlington*, the Court focused on the need to serve the policies that Title VII was enacted to advance. *See, e.g., Faragher*, slip op. at 25 n.3, 26, 28-29. Among the concerns expressed by the Court were that (a) in 1964 (and again in 1991) Congress presumably legislated with awareness of the distinction between actions that fall within the scope of an individual's employment and those that do not (which are often labeled "frolics or detours") recognized in the common-law of agency, *see id.* at 20-21,[4] (b) under Title VII, as construed by the Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), "an employer is not 'automatically' liable for

---

[4] In discussing what sorts of employee actions an employer would have been liable for under common law, the Court listed three examples of employee conduct. *See Faragher*, slip op. at 21. As an example of a "frolic" for which the employer should not be liable, the Court described the following incident: "the supervisor who . . . expresses his sexual interests in ways having no apparent object whatever of serving an interest of the employer." *Ibid.* A single incident of harassment such as that at issue in this case would appear to be the epitome of such a frolic for which the employer should not, without more, be liable.

harassment by a supervisor who creates the requisite degree of discrimination," *Faragher*, slip op. at 26, and (c) any theory of vicarious liability for supervisor misconduct "would be at odds with the statutory policy" if it failed to provide employers with an incentive to create an environment in which violations would be reported and remedied. *Id.* at 29. Application of the second part of the new affirmative defense to a one-time incident of harassment committed by a person who lacks authority over the victim would contravene each of these policies embodied in Title VII.

If the affirmative defense announced in *Faragher* and *Burlington* is applicable to a case such as this, an employer will, for all practical purposes, be automatically liable for its employee's "frolic" so long as the victim takes advantage of the procedures the employer has put in place for reporting of such incidents.[5] The employer may take every precaution to avoid such incidents, and may then take appropriate remedial action, but so long as the employee acts reasonably to avoid harm and reports the incident in a timely manner, the employer will be vicariously liable.[6]

---

[5] *Cf.* Analysis: Supreme Court Increases Liability of Employers for Sexual Harassment But Creates Affirmative Defense, 158 Lab. Rel. Rep. (BNA) 296, 301 (July 6, 1998) (noting that, if the *Faragher* affirmative defense applies to a case such as this, "the second part of the defense probably could not be satisfied").

[6] In this case, Petitioner's conduct during the incident (including, for example, her decision to return to Moreland's hotel room) was not the subject of any jury findings. Ortho does not concede that Petitioner's conduct was reasonable; indeed, if this part of the affirmative defense applies to a case such as this, then that matter would need to be addressed either in the Court of Appeals or, perhaps, the District Court. Of more importance, however, is the fact that, in a case such as this, it would be inconsistent with the purpose of Title VII for a legal standard

If that is, indeed, the legal framework applicable to a one-time incident of harassment such as this, then Title VII provides no incentive for an employer to prevent or remedy such incidents because liability will attach regardless of the employer's conduct. Rather, the employer will have every incentive to disprove the alleged harassment, and an employee, knowing that this is the response he or she is likely to receive, will lose the incentive that currently exists to report such an incident. This cannot be the result that was intended by Congress or by this Court.

The anomalous result occurs only if the framework announced in the context of chronic, unremedied incidents of harassment is, as the Petitioner demands, applied to an unforeseen one-time incident of harassment. The objectives that the *Faragher* affirmative defense is designed to advance in the classic "hostile environment" context are, to the contrary, undermined if the defense — specifically, the aspect of the defense focused on the negligence of the employee — is applied in a case such as this. Accordingly, the affirmative defense must be limited to the circumstances that led to its creation.[7]

---

to be imposed on the employer that would create a strong incentive for the employer to disprove an allegation of harassment and to attempt to shift the responsibility for such harassment to the victim. *See* Pet. App. A-12.

[7] The two cases that the Court remanded in light of *Faragher* also involved numerous incidents of sexual harassment. *See Reynolds v. CSX Transportation, Inc.*, 115 F.3d 860, 863 (11th Cir. 1997) ("six instances of inappropriate behavior" over "four or five weeks"), *cert. granted, vacated, and remanded*, 118 S. Ct. 2364 (1998); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1440-41 (10th Cir. 1997) (numerous incidents that occurred over two months), *cert. granted, vacated, and*

### *The Court of Appeals Has Already Conducted the Proper Analysis*

Petitioner's request for remand rests on the premise that the Court of Appeals would benefit from an opportunity to reconsider its decision in this case in light of this Court's intervening decisions in *Faragher* and *Burlington*. What Petititioner fails to acknowledge, however, is that the Court of Appeals was given an express opportunity to defer its decision pending this Court's decision in *Faragher* (which it declined),[8] and, more importantly, that the analysis conducted by the Court of Appeals was conducted within the very same framework called for by this Court in *Faragher*.

In setting out the principles used to determine when an employer should be liable for the actions of its employees, *Faragher* notes that

> [t]he proper analysis . . . calls not for a mechanical application of . . . factors . . . , but rather an enquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment.

*Faragher*, slip op. at 19. The Court of Appeals conducted precisely that analysis, with express reference to the policies sought to be advanced by Title VII:

---

*remanded*, 118 S. Ct. 2364 (1998).

[8] In her rehearing petition, in which she also sought en banc review, Todd expressly asked the Court of Appeals to vacate the panel decision and await this Court's decision in *Faragher*. *See* Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc 1-2, 7-9. That request was denied.

> Viewing the question more broadly than the facts of this case, we think it contrary to both the intent of the statute and principles of agency law to impose liability upon an employer for the wrongful act of a supervisor acting well beyond the scope of his duty, particularly when the harassment complained of is a one-time act committed outside the workplace that the employer could not have anticipated. A strict liability standard will not encourage employers to promulgate anti-sexual harassment policies. A rigid standard of imputed liability will discourage employers from aggressively investigating complaints of sexual harassment by supervisors, complaints which, if proven true, will only redound to the employer's financial detriment. And such a standard fails to encourage and reward employers for taking prompt and effective remedial action to discipline sexual harassment offenders and to restore for the victim a workplace free of such discrimination.

Pet. App. A-12. Given the Court of Appeals' careful analysis of the reasons that support and oppose extension of vicarious liability to an employer on these facts, consistent with and as required by *Faragher*, a remand of this action would serve little purpose.

## CONCLUSION

This Petition presents neither a conflict within the lower courts nor an "important federal question." Rather, it involves no more than Petitioner's misguided attempt to relitigate her case in light of this Court's recent decisions in *Faragher* and *Burlington*. Neither decision bears, or purports to bear, on the questions presented by a one-time incident of sexual harassment committed by an employee who was not the victim's

supervisor. Accordingly, Ortho respectfully asks that the Court deny the Petition for Writ of Certiorari.

Dated: August 21, 1998

David F. Herr
*Counsel of Record*
Howard B. Tarkow
Susan Oliphant
Cynthia F. Gilbertson
Michael C. McCarthy
MASLON EDELMAN
BORMAN & BRAND, LLP
3300 Norwest Center
90 South Seventh St
Minneapolis, MN 55402
(612) 672-8200

201536

FILED
SEP 4 1998
OFFICE OF THE CLERK
SUPREME COURT

No. 98-155

In the

# Supreme Court of the United States

October Term, 1998

Lori A. Todd,

*Petitioner,*

vs.

Ortho Biotech, Inc.,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

James P. McCarthy
*Counsel of Record*
David A. Allgeyer
Ansis V. Viksnins
Scott E. Korzenowski
LINDQUIST & VENNUM P.L.L.P.
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2205
(612) 371-3238

*Counsel for Petitioner*

1998 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

## TABLE OF CONTENTS

Page

INTRODUCTION ..... 1

DISCUSSION ..... 2

I. ORTHO FAILS IN ITS ATTEMPT TO AVOID THIS COURT'S RECENT HOLDINGS ..... 2

A. The *Faragher* and *Burlington Industries* rule applies to a severe one-time incident of sexual harassment ..... 2

B. The harasser in this case had sufficient authority to place Ortho within the holdings of *Faragher* and *Burlington Industries* ..... 6

CONCLUSION ..... 10

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Burlington Industries, Inc. v. Ellerth*,
524 U.S. ___, 118 S. Ct. 2257 (1998) ..... *Passim*

*Faragher v. City of Boca Raton*,
524 U.S. ___, 118 S. Ct. 2275 (1998) ..... *Passim*

*Meritor Savings Bank, FSB v. Vinson*,
477 U.S. 57 (1986) . ..... 2, 6

### FEDERAL STATUTES

42 U.S.C. § 2000e-2 (a)(1) ..... 7

Title VII of the Civil Rights Act of 1964 ..... *Passim*

## INTRODUCTION

In requesting that this Court deny Petitioner-Employee Lori Todd's petition for a writ of certiorari, Respondent-Employer Ortho Biotech, Inc. ("Ortho") incorrectly states the holdings of both *Faragher v. City of Boca Raton*, 524 U.S. ___, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. ___, 118 S. Ct. 2257 (1998). The general theme of Ortho's brief in opposition is that the rule established by this Court in *Faragher* and *Burlington Industries* does not apply to a single, egregious incident of sexual harassment committed by a supervisory level employee who was not directly in the employee's reporting chain. Ortho's argument, however, is in direct contradiction to this Court's clear holdings in both *Faragher* and *Burlington Industries*:

> We hold that an employer is vicariously liable *for actionable discrimination caused by a supervisor*, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim.

*Faragher*, 524 U.S. at ___, 118 S. Ct. at 2280 (emphasis added); *see also Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2270 (an "employer is subject to vicarious liability to a victimized employee *for an actionable hostile environment created by a supervisor* ..." (emphasis added)). Because the holdings of *Faragher* and *Burlington Industries* require that courts hold employers vicariously liable for all actionable sexual discrimination caused by a supervisor, subject only to the stated affirmative defense, this Court should reject Ortho's position and summarily reverse the Eighth Circuit's decision or, in the alternative, remand the case to the Eighth Circuit for reconsideration in light of *Faragher* and *Burlington Industries*.

## DISCUSSION

### I. ORTHO FAILS IN ITS ATTEMPT TO AVOID THIS COURT'S RECENT HOLDINGS

Ortho contends that the rule of employer liability announced in *Faragher* and *Burlington Industries* does not apply to the instant case because of two minor factual distinctions between those cases and Ms. To[illegible] case: (1) a severe one-time incident of sexual assault cre[illegible]l the hostile work environment in the instant case, whereas a series of less serious acts was the factual predicate for *Faragher* and *Burlington Industries*; and (2) the supervisor/harasser in the instant case may not have been in the employee/victim's "chain of command" at the time of the attack because of a lateral move within Ortho three weeks before the incident. Neither distinction places the instant case outside the reach of *Faragher* and *Burlington Industries*.

#### A. The *Faragher* and *Burlington Industries* rule applies to a severe one-time incident of sexual harassment.

Despite Ortho's contention to the contrary, the employer liability standard articulated in *Faragher* and *Burlington Industries* applies to one-time incidents of sexual harassment. The creation of a hostile working environment is a form of sex discrimination. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). A hostile work environment occurs when an employer's sexually demeaning behavior is "severe *or* pervasive." *Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2265 (emphasis added).

The supervisors' acts in *Faragher* and *Burlington Industries* were found to be actionable because they were pervasive, whereas the supervisor's act in the instant case was

found to be actionable because it was severe. As the Eighth Circuit noted:

> In this case, Ortho quite properly concedes that an attempted rape at a national sales meeting is sufficiently severe misconduct to be *actionable sexual harassment*.

Pet. App. A-10 (emphasis added). Having admitted that its supervisor's attempted rape of Ms. Todd created a hostile work environment, Ortho is hardly in a position to argue that a single reprehensible act should lead to a more employer-friendly standard of liability than a series of less serious offenses. Under *Faragher* and *Burlington Industries*, employer liability does not depend upon whether the actionable sexual harassment is based upon pervasive acts or one severe act:

> The case before us involves numerous alleged threats, and we express *no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment*. When we assume discrimination can be proved, however, the factors we discuss below ... will be controlling on the issue of vicarious liability.

*Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2265 (emphasis added). Thus, the only question before the Eighth Circuit was whether Ortho is liable for the sexual harassment perpetrated by its high-ranking supervisor. Although Ortho attempts to obfuscate the situation, the fact remains that Ortho is vicariously liable for the sexual harassment of its high-ranking supervisor subject only to its ability to prove the affirmative defense articulated in *Faragher* and *Burlington Industries*.

Ortho presents no direct support from the Court's opinions to support its contention that it should not be vicariously liable, but instead argues that application of the *Faragher* and *Burlington Industries* rule "to a one-time case of harassment such as this would, quite simply, be nonsensical." Brief in Opp. at 10. In addition, Ortho argues that "*Faragher* and *Burlington*'s additional focus on the possible negligence of the victim – which arose in the context of long-running incidents of sexual harassment – makes no sense when applied to a one-time incident of sexual harassment." *Id.* at 11.

Ortho's contention is based upon its theory that Title VII must be interpreted such that an employer can always avoid liability through *reaction* – by discovering and remedying isolated, but not severe, incidents before they create an actionable hostile work environment.[1] In so arguing, Ortho suggests that this Court has created a rule of vicarious liability for hostile work environment sexual harassment claims based upon pervasive actions while somehow leaving in place the negligence standard used in co-worker harassment cases if the claim is based upon an isolated but severe action.[2] As Justice Thomas noted in his dissent, however, the new rule no longer provides Ortho the escape hatch upon which the Eighth Circuit based its decision:

---

[1] Essentially, Ortho is asking this Court to abandon the vicarious liability standard embraced in *Faragher* and *Burlington Industries* and reinstate the negligence standard employed by the Eighth Circuit. This is, however, the standard rejected by this Court in *Faragher* and *Burlington Industries*. *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2294 (stating that a remand for reconsideration "of negligence as an alternative to a theory of vicarious liability here" would be unjustifiable).

[2] If anything, this Court in *Faragher* and *Burlington Industries* sought to eliminate, rather than create, distinctions. This Court concluded that "a uniform and predictable standard must be established as a matter of federal law." *Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2265.

> This rule applies even if the employer has a policy against sexual harassment, the employee knows about the policy, and the employee never informs anyone in a position of authority about the supervisor's conduct.

*Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2271 (Thomas, J., dissenting).[3] As such, the distinction upon which Ortho bases its argument is without a practical difference.

Moreover, Ortho's interpretation of *Faragher* and *Burlington Industries* conflicts with the "apparently unanimous rule" holding employers vicariously liable for one-time incidents of quid pro quo[4] sexual harassment. *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2285. If *Faragher* and *Burlington Industries* stand for the proposition that a special rule applies in single incident harassment cases, one would have expected this Court to overrule the myriad circuit court

---

[3] Ortho's reliance upon the existence of its sexual harassment policy is curious in that it never established at trial that it had *disseminated* such a policy. Ortho refers to two memoranda distributed prior to the attack, but at no time did Ortho enter its sexual harassment policy into evidence at the trial or establish that Ms. Todd received the policy. Under these circumstances, Ortho's protestations that it exercised reasonable care to prevent the attack are without merit. *See Faragher*, 524 U.S. at ___, 118 S. Ct. at 2293-94 (liability found where defendant failed to distribute its sexual harassment policy to employees in plaintiff's position).

[4] This Court has erased any significant difference between the legal standard employed for holding an employer liable under claims for sexual discrimination based upon quid pro quo and under claims for sexual harassment based upon hostile work environment. *Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2265 ("When we assume discrimination can be proved ... the factors we discuss below, and not the categories quid pro quo and hostile work environment, will be controlling on the issue of vicarious liability.").

opinions holding employers vicariously liable for one-time incidents of quid pro quo harassment. *See Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2264-65 (gathering cases). Instead, this Court stated that the "soundness of the results in these cases (and their continuing vitality) ... was confirmed by this Court's only discussion to date of standards of employer liability, in *Meritor*." *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2285 (parenthetical in original).

Finally, this Court's holdings in *Faragher* and *Burlington Industries* do not support Ortho's contention that application of the rule to the instant case would provide "no incentive for an employer to prevent or remedy such incidents." Instead, this Court has explained that the new rule of vicarious liability, subject only to the affirmative defense, provides employers with much incentive to assure that its high-ranking supervisors do not engage in sexual harassment:

> Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

*Faragher*, 524 U.S. at ___, 118 S. Ct. at 2291.

### B. The harasser in this case had sufficient authority to place Ortho within the holdings of *Faragher* and *Burlington Industries*.

Ortho also states, without citation to any portion of either opinion, that *Faragher* and *Burlington Industries* require application of the negligence standard of employer liability

used in co-worker harassment cases whenever the offending supervisor "lacks the authority to cause a tangible employment action." Brief in Opp. at 9-10. Ortho goes on to make the remarkable assertion that the National Director of Trade Relations who attacked Ms. Todd more closely resembled a co-worker than the type of supervisor contemplated by *Faragher* and *Burlington Industries*. Ms. Todd specifically addressed this issue at length in her petition for writ of certiorari, *see* Pet. at 14-17. It suffices here to note that, even if the supervisor in the case at bar lacked the actual authority to hire and fire the victim,[5] he never "more closely resemble[d] a co-worker" because, at the very least, the jury and trial court found that Moreland possessed and used his apparent authority to accomplish the harassment. Pet. App. A-61, A-40-41, A-46.[6]

Ortho characterizes Ms. Todd's contention that she reasonably believed Moreland to possess supervisory power at the time of the attack as "a wholly new twist" on her theory of

---

[5] And once again, Ms. Todd reiterates that Ortho has failed to establish this fact at any point in the litigation.

[6] Moreover, Ortho's focus upon Moreland's ability to hire and fire is an incorrect analysis of Title VII liability. Although illegal hiring and firing are included as violations of Title VII, neither is required by the statute or corresponding case law. 42 U.S.C § 2000e-2 (a)(1), (stating that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex."); *Meritor*, 477 U.S. at 64 (stating that the "phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment"). Instead, a supervisor need only improperly affect the terms and conditions of employment to violate the statute. Here the district court found that "it was more than reasonable for the jury to infer that Moreland could easily influence all facets of [Ms. Todd's] career at Ortho Biotech by virtue of his top management position." Pet. App. A-31.

the case. Brief in Opp. at 3. Nothing could be further from the truth. Ms. Todd presented a great deal of evidence both to the effect that Moreland was in a position in the company hierarchy to have significant control over her employment situation and that she reasonably understood him to have such control. Pet. at 10-11 (summarizing evidence). As a result of this evidence, Ms. Todd requested Jury Instruction No. 37.[7] Brief in Opp. at 6-7. As part of this instruction, the court directed the jury to follow § 219(2)(d) of the Restatement (Second) of Agency-- precisely the same statement of law upon which the *Faragher* and *Burlington Industries* rule for employer liability is based. *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2290; *Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2267-70; *but see* Pet. App. A-11 (Eighth Circuit refers to Instruction No. 37 as "reversible error"). As a result of that instruction, the jury specifically found that Moreland used "his actual or apparent authority at Ortho Biotech to further his harassment of Ms. Todd, or was ... otherwise aided in his accomplishing his harassment by virtue of the position he had with Ortho Biotech." Pet. App. A-61.

It simply does not matter whether a supervisor uses actual or apparent authority to sexually harass an employee. As this Court noted, "[t]he illustrations accompanying ... subsection [219(2)(d)] make clear that it covers *not only cases involving the abuse of apparent authority*, but also to cases in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship." *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2290. Such a conclusion dovetails perfectly with the basis upon which this Court decided *Faragher* and *Burlington Industries*: Employers will be liable if a high-ranking supervisor relies upon his or her position to create a hostile work environment. Both the jury and the trial

---

[7] The complete jury instruction can be found in the appendix to the petition. Pet. App. A-68.

court found that Moreland relied upon his position to require Ms. Todd to accompany him to his hotel room where the attempted rape occurred; and both the jury and trial court found that Ms. Todd accompanied Moreland to his room because she reasonably perceived him to have authority over her career. Without further analysis, these findings are sufficient to impose vicarious liability on the employer subject only to the stated affirmative defense. *Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2267-68 (stating that under the new rule of vicarious liability, an employer will be liable for supervisor sexual harassment when the victim's mistaken conclusion that the actor was a supervisor is a reasonable one).

## CONCLUSION

Ortho's attempt to avoid the holdings in *Faragher* and *Burlington Industries* is without merit. Quite simply, the Eighth Circuit applied the wrong rule in reversing Ms. Todd's trial court judgment. Justice demands that this Court apply the correct rule. For the reasons set forth in Ms. Todd's petition for a writ of certiorari, this Court should grant the petition and summarily reverse the Eighth Circuit's ruling. Alternatively, this Court should grant the petition and remand the case for reconsideration consistent with the holdings in *Faragher* and *Burlington Industries*.

Dated: September 3, 1998

James P. McCarthy
*Counsel of Record*
David A. Allgeyer
Ansis V. Viksnins
Scott E. Korzenowski
LINDQUIST & VENNUM P.L.L.P.
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2205
(612) 371-3211

*Counsel for Petitioner*